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THE SCIENCE OF LAW*

By

K. NAGARAJAN, B.A., B.L., *Advocate, Pudukkottai.*

To be called upon to deliver the Eardley Norton Endowment Lecture is a great honour. I am deeply sensible of it, and I thank the Bar Council for selecting me to deliver it. I may confess straightaway that I do not possess the necessary qualifications; however, I shall not dwell on my deficiencies, as that will take time, and so shall request you to take them as read. In this lecture, I shall not seek to do more than to indicate, very sketchily, and in a rudimentary fashion, my views on the subject formed in the course of a long and uneventful career at the *mofussil* Bar.

The subject which has been set to me is The Science of Law. Having been bred in the atmosphere of the law Courts, I sense a preliminary note of dissent. I seem to see my learned friend rise in his place and growl, "My Lud, I object", and, in answer to a questioning eyebrow, hear him say, in sharp, staccato accents, "There is no Science of Law", and then, with added emphasis, "There can be no Science of Law. The Laws of Science, one can understand, but the Science of Law—it is a contradiction in terms". And so, the discussion proceeds. The law, we are reminded, is a collection of mandates, all imposed by a human authority on human beings and as various as the authority which imposes it or the community on which it is imposed. Whatever the law may be, admirable, or the reverse of admirable, its claim to rank as a science, we are told, is very slender.

It would be helpful if I could follow the example of Euclid and begin with a clear and comprehensive definition of the term Science, get its frontiers set, its shades of meaning and implication conveyed with precision. That, I am afraid, is beyond me. Science means, in one view, those eternal laws which govern natural phenomena, like the diurnal revolution of the sun, the succession of the seasons, the motions of the stars or the coming of the monsoon, all those phenomena which occur in a regular sequence of cause and effect and which can be foretold with precision. The term is also applied to the systematic study of subjects like physics, chemistry, psychology, the social sciences, indeed, any subject where systematic study reveals the forces at work and the results of their interaction. The well-known physicist, Max Planck, is of the view that "all science is one self-contained unity and that it is a continuous chain from physics and chemistry to biology and anthropology, and thence to the social sciences". The methods of inquiry are very similar. Individual experience, linked up with other and similar experiences leads to the discovery of underlying principles of action. In so far as the law is concerned, we would be safe in saying that the term 'science', as applied to it, means the fundamental principles from which its rules derive their origin and sustenance, and which operate similarly, or with local modifications, in all countries which recognise the Rule of Law.

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* Eardley Norton Endowment Lecture delivered under the auspices of the Madras Bar Council on 3rd January, 1957.

The points commonly urged against the law are:

(1) it lacks certainty; it is swathed in verbiage, its word-values are shifting, and it goes in for fictions to avoid awkward corners;

(2) it is unpredictable;

(3) it is constantly changing.

The protagonists of the law assert, the uncertainty is exceptional, so exceptional that it is negligible. For all practical purposes, the law is clear enough. One can go about the day's work and keep within the law, without any difficulty.

It is predictable—with reasonable certainty. Your case may break on the facts, and then your forecast may fail. If your facts are firm, the law will not present any difficulty. If you know your law, and the Court does, disagreement is automatically ruled out, though it may happen, once in a way, that the Court takes a wider or a narrower view of the law than is warranted by precedent, in the light of which, doubtless, you made your forecast.

As for the charge of change, it is true that the law changes, but so does life. The law, if it is to be true to itself, must change too, in order to keep pace with life. It should be, like the sun-dial, "true to the sun, though not shined upon". Lawyers should be quick to discern the changing tempo; they should be on their guard against becoming wooden, hide-bound, case-hardened. Given an alert mind and a lively sense of right and wrong, of what is just and fair, the law can be used as it is meant to be used, an effective instrument for the maintenance of social order.

Which, I hope, is not an unfair picture of the case for and against the law.

Law, it goes without saying, is not an exact science. And it is far from uniform. Legal doctrines seem to vary with every parallel of latitude. And yet, there is a family resemblance between the laws of different countries which points to similar motivations which, in turn, derive from more or less similar social needs and urges; the law is a hardy growth; it may appear to be haphazard, but there is method in its haphazardness. It may not have risen, like the walls of Troy, "to the sound of a music, slowly breathed", but it has grown, all the same, from dim beginnings, acted on by contrary winds, rasied by varying social pressures. In the crucible of man's minds, a process, almost chemical, has been at work, evolving those notions which are the common inheritance of mankind. It has produced ideas which have entered into the warp and woof of our being, like, for instance , that a man should not be a judge in his own cause that the public interest can override private considerations and all those rights which we have come to regard as fundamental. The structure and organisation of the law, the way it grew, the conditions governing its growth, the influences which shaped it and, above all, the sanctions which give its rules validity and strength, are matters which admit of scientific and systematic study.

Careful observation and research help to reveal the forces at work and, in this respect, law is like astronomy, where observation is the main instrument of study, unlike the physical sciences where one can employ the method of experiment. And, even as in astronomy, nothing happens by chance, one finds that legal rules are rarely accidental but can be traced to some cause, to some fact of life, which may not lie on the surface, but which can be disinterred by delving into the past. This does not mean that legal rules are all perfect of their kind; in many cases, they were *ad hoc,* makeshift expedients, which have managed to linger on, though they have become out-of-date and do not serve any purpose. In such cases, a lively social conscience asserts itself and brings about—in time—a change in the rules.

I said that the law varies from clime to clime. What is belauded as the right principle—*summum jus*—by one country, is looked on with disfavour by another. Take, for example, the doctrine of consideration in the law of contracts. According to the Indian Law of Contracts, the rule is, as every schoolboy knows, "No consideration, no contract." Across the Palk Strait, in the island of Ceylon, where the Roman-Dutch law governs, consideration is not a necessary element. According to the Common Law of England, as in India, there can be no contract without consideration. On the other side of the English Channel, in France, it is just the reverse, they have no use for consideration. They ask, very rightly, one should admit, why a solemn promise by which a person bound himself should not be enforced by Courts of law. If a promise under seal can be binding, there is no reason why a man's solemnly pledged word should n't. Why should a piece of wax or wafer make any difference? If all that is needed is evidence that the promise was not made lightly but was made with every intention of being bound, it can be provided in other ways than writing under seal. The presence of consideration may well be evidence of an intention to be bound, but it is not the only way in which such an intention can be proved, and there is no reason, therefore, to regard consideration as the essence of a contract, the vital principle which endows it with life.

Now, one may ask, why this difference between countries separated only by a score or so of miles of sea? Is the answer to be, in Shylock's phrase, that it is just the humour of the country concerned? If that were so, the claim of the law to be considered a science would be very slender indeed.

However, we know the position is not as arbitrary as all that. The difference is due to the way in which the law of contract developed in different countries. It is in the history of its growth on different soils that the explanation is to be found. In Europe, it was all due to the impact of the Civil Law. On the Continent, in the twelfth and the thirteenth centuries, the *corpus juris civili* came to be studied enthusiastically. The continental countries fell under its spell; England, ever insular, resisted it. In England, practising lawyers came to be appointed as judges, and they saw to it that the law developed on indigenous lines. Even on the Continent the Civil Law had to contend against the Canon Law. Under the Civil Law, there could be no contract without a *causa*. What did *causa* mean? It was said, consideration. The canonists took an ethical line and insisted that once a man had passed his word, he should be held to it. The result was that the notion of *causa* was so generalised and attenuated that what remained was, to quote Sir William Holdsworth, "a judicial fragment". The French Code refers to *causa* as an ingredient of a contract, but it has been held that whatever else the word may mean, it does not mean consideration in the sense in which we understand it. The German and Swiss Codes, I understand, do not refer to it at all.

In England, the doctrine of consideration came to be established, not on its merits, but purely as a result of procedural requirements. The writs were the foundation of actions for redress in the law Courts of England. If you had a claim for relief, you had to find an appropriate writ. There was the writ of covenant, but that covered only contracts under seal. So, recourse was had to the writ of debt on the footing that the plaintiff had done something in pursuance of a contract and thus conferred a benefit on the defendant, for which the defendant had to pay. But this action was not appropriate in the case of executory contracts. So, they invented a new form of action—assumpsit—and developed it so, that it came to cover cases where the plaintiff had suffered some detriment as a result of the defendant not doing that which he had promised to do, or having done it badly. The action was then extended to the case of a promise for a promise, purely executory contracts. In this way, the twin notions which we associate with consideration, namely, benefit and detriment, came to dominate the law of contract, like the Old Man of the Sea in Sindbad the Sailor. The figure of comparison is not so inappropriate as it may appear at first sight. Lord Mansfield—and, in our own day, Lord Wright of Durley, to mention only two have cursed the doctrine of consideration by bell, book and candle. They looked upon it, if one may say so, as a hybrid baby which had no business to be there. But the baby has continued to be there, no longer a bady, or a llusty youth but a well-grown adult, who has stamped the law with the impress of his personality.

When English influences began to spread in India, English legal notions found their way into the country, where they were accepted without question. They came, saw and entrenched themselves as part of the law of the land. There is no need to regret the infiltration but it is quite possible that, if there had been a popular legislature at the time, great debates would have been held and every rule discussed threadbare before it was placed upon the statute-book. Indian representatives might conceivably have taken the line of the canonists and insisted that it was the duty of man to keep faith, irrespective of any *quid pro quo.* In this, they would have taken the line of the Scots who went in a good deal for philosophical speculation and found their mentors in philosophy, theology and law on the continent and like the Scots rejected the doctrine as unethical. They might have quoted Dasarata, Harischandra and the Emperor Sibi with effect. If consideration need not be adequate and anything *nam ke vaste* will do, a tomtit or a peppercorn or a bunch of radishes, there was no need to retain a rule which, if you came to think of it, was more laughable than logical.

However, the doctrine of consideration found its way into India where it has remained on the statute-book all these years. But, why, one may ask, why did not the English reject such an illogical doctrine? The answer, perhaps, is that it is not so illogical as it may appear at first sight. Or, it may be that, even if it were illogical, the practical-headed English found it convenient to work. A man may make a promise, but he may have made it without thinking. He may have acted under a sudden impulse and with no greater seriousness than when you ask a man you meet in the train to stay with you if ever he happened to come to your town. Long experience of men and affairs should have made them, like the practical-headed Indian, realise that men do not always look before they leap and frequently require to be protected against themselves. And then there were those clever, designing persons who will not scruple to take advantage. They must have been aware, like Robert Burns, that

"Mankind are unco' weak,
An little to be trusted;
If self the wavering balance shake,
It's rarely right adjusted!".

The propensity of men to enter into transactions in haste and repent at leisure must have been present to the mind of Manu, who records that it was the practice to give the parties ten days grace so that they could, if they chose, resile from any transactions they may have entered into. A *locus penitentiae* was given so that second thoughts may prevail in the case of those who are assailed by *kritanusayam,* doubts about what they had done, or, *paschattapam,* in Narada's words.

Two lines of thought were thus open and England chose one of them. It is all bound up with the life of the country. It is a part of its history. The *genius loci* has contributed to the result. The point is that the minds of men have been at work and have contributed to given results.

Indian Law teems with instances of conflicting customs which have crystallised into different schools of law. In succession, inheritance, adoption, in every field of personal law, the law varies with the provinces. What is approved of one school is abhorred of another. The law of adoption, for instance, is a mass of clashing customs, all deriving or professing to derive from the same sacred text or commentaries which speak in a hundred voices. When can a widow adopt? Is consent required and, if it is, whose? Is the husband's authority a *sine qua non*? These and a score of other points have arisen for consideration and a good deal of ingenuity has been brought into play to uphold or denounce a given adoption.

Then, as to the person adopted. Here, again, the rules differ. They all arise from the same text, one of Caunaka's that the adopted son should be the "reflection of a son". This fiction is the expression of an intelligible attitude of the mind. But the fiction has been worked to death. It has been treated logically or pseudo-logically with fantastic results. Since an adopted son had to be the reflection of a son, it was argued that he should not be one whose mother the adopting father could not legally have married, a line of reasoning which took no account of possible ties of affection. Thus it came about that the adoption of a daughter's son or a sister son or an aunt's son was prohibited. Technically, that was so but in some parts of the country, custom has come to the aid of common sense. Even fiction has its limits, or else it degenerates into farce.

Fiction or fact, the Hindu Law of Adoption is a fair reflection of the constant struggle in the minds of men between spiritual longings and the craving for possessions. The desire for a son is bred in the bones of a Hindu. Every Hindu longs for a son, for two reasons; one, to perpetuate his line and, two, to save his soul. This latter exalted adoption into a religious duty. Suppose a soneless man was on his death-bed and wished to take a son in adoption. If he had ample possessions, agnates with a plurality of sons would have vied with one another to help in the saving of his soul by offering a son of theirs in adoption to him. But, suppose he had only a soul to save, and no possessions to leave behind, it was only a sister or a daughter who would have come forward to soothe his dying moments and give him a son of hers, though she may have had nothing to show for it.

An increase in the number of such adoptions would, in course of time, have led to men of means following the dictates of natural affection and adopting a daughter's son or a sister's son, and then they would have had to face the music. For money not only makes the mare go, it provokes litigation. Rival exponents of the law would have gone into action, armed with sacred text and commentary and precedent, and succeeded, now here, and now there. In all probability, the interpretation of Caunaka's metaphor was brought about by influential agnates taking the field against adopted cognates, in the attempted protection of their reversionary interests.

That seems to me to be the only explanation of such an unnatural bar. If somebody else's son can, by a fiction, become yours, why should not that somebody be anybody you happen to like? The bar, doubtless, was the result of secular considerations coming into conflict with religious duty.

It thus happens that the Hindu Law of Adoption is an amalgam of religious precepts, conceptions of life after death, concern for one's wordly possessions and, if I may add, grab. In other words, of law, metaphysics religion and self-interest. In this field, (as in other fields of law) logic has not been allowed to run its course. Faith, in uneasy alliance with faction, is responsible for the current legal position. A hundred decisions have been given, now stressing the religious aspect, now the secular. The pendulum has swung this way and that and now, it has been authoritatively laid down that it is the religious motive which governs the position. (*Amarendra's case*). The motives of the reversioners in withholding consent (invariably improper) are material. Even a widow's motives do not seem to be altogether irrelevant. But why should anybody's motive count? If a son is a paramount necessity, why go into the motives which precede his appearance? Nobody, in early manhood, begetting sons, does so with a view to save his soul (to whose possible existence he probably never gave a thought). If a son so begotten could serve the purpose, why not a son raised by adoption, whose functions and duties are precisely similar to those of an *aurasa* son, uncomplicated by the motives of the consenting sapindas or the adoptive mother? If you are allowing a fiction, why not, if you will forgive a confusion of metaphor, go the whole hog?

Dexterity in dealing with certain situations resulting from an adoption has sometimes given the law a light touch. Consider, for instance, the vexed question as to the claims to the motherhood (of course, fictitious), of a person who has been taken in adoption by one who had two wives, both of whom were dead at the time of the adoption. Does the adoption relate back to the time when the wives were alive, or at least, to the time when what I may describe as the 'appointed mother' was alive? If not, why not? If the doctrine of relation back can apply to the case of a father dead at the time of the adoption but to whom an adoption is made by the widow, why should it not equally apply to the case of the mother? What is sauce for the gander should be sauce for the goose. The state of the law of adoption is grist to the mill of those who charge it with lack of logic and consistency. If you go to work on afiction, why not as I said before, go the whole hog? In the words of Baron Alderson, who disapproved of overstepping a declared limit of liability (he was dealing with the law of negligence) if you can go one step beyond the limit, why not fifty?

To these questions there seems to be no answer in logic. At any rate, our Parliament has seen none. In the new law of adoption which they have passed, they have broken away from the old moorings but the heavens have not fallen and the earth continues to move in its accustomed course. There has not been much public acclaim over it either, or, for that matter, over any of the drastic changes which have of recent years been made in other branches of the law. That is because men in the mass are generally inert and reforms are the work of the thinking few. As the French Philosopher Pascal said, "*Peu de chose nous console, parce que peu de chose nous afflige.*

Time and judicial decisions have adulterated the pure milk of the *shastraic* doctrine of pious obligation. From the son's duty to discharge his father's debts, irrespective of the possession of assets, to an obligation to discharge them only if, and to the extent, he has received assets is a far cry. The change has not shocked orthodox opinion, and so, must be held to be justified. Judges, to the extent to which they have contributed to bring about the change, it must be conceded, had their fingers on the pulse of society.

Mr. Justice Coutts-Trotter, as he was at the time once remarked that logic was the last thing he would look for in the rules of Hindu Law. The remark had a slight tinge of acid but nonetheless, it was true. The lack of logic, however, is not necessarily to the discredit of Hindu Law and it is as much a feature of other systems of law as well. Lord Halsbury's dictum is well-known. "A case is authority only for what it actually decides. In entirely deny that it can be quoted for a proposition that may seem logically to follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must admit that the law is not always logical". *Quinn* v. *Leathem*. This shows that the law is alive and alert and has been able to adjust itself to changing conditions. We may Medise and Persianise the law but that would only mean the end of all law. The right development of the law is based upon something more imperious than logic, and that is life. And, it is in the measure that it reflects and assists in the growth of full and free social activities that the law may be said to succeed in achieving its real purpose. If you seek to confine the law within bounds fixed for all time, it is sure to burst its barriers and take a course in keeping with its real nature.

This subordination of literalism and logic to the demands of a growing society is an outstanding characterestic of the Common Law of England. The Common Law is unwritten law—*lex non scripta*—the growth of centuries, what in Tamil can expressively be described as *ayiramkalathupayier*. It was not a planned development but a haphazard growth shaped by the shifting wind and rain, decision piled upon decision, the work of a long succession of judges. It may lack the logic and symmetry of codified law or the work of institutional writers, but it has its points and takes the eye more readily than, what in Tamil can expressively be decided as *ayiramkalathupayir*. It was grown, like the English language, adapting itself to the changing circumstances of the country. It was almost biological in its development, like the dropping of an appendix, or the developing of fins like the fishes of the sea, to meet the needs of aquatic life. To understand its growth, one should understand the changing needs of men, the changes in the climate of social opinion. All the same, it should be confessed that, to the layman, the Common Law is a bewildering medley, so bewildering that it drove the poet,

Tennyson to lament
The lawless science of the law,
The codeless myriad of precedent,
The wilderness of single instances.

To those with orderly, card-index minds, this may appear unsatisfactory. They would prefer a handy case—anyone would—kith a few sections, if that were practicable, or a bulky tome, if that cannot be helped, with the law divided into chapters, sections, with provisions, explanations and exceptions, guaranteed to provide for any situation which may arise. They would like the law to be, in the words of a popular jingle,

> A being which runs in predestinate grooves,
> In fact, not a bus, but a tram

the path to be well-laid-out and unmistakable, instead of which, it is frequently unidentifiable and lies in unexpected tracks. That is easier said than done. Frederick th Great tried it and failed. Napoleon wanted a clear-cut, lawyer-proof code. He did'nt get it. Codes are followed by commentaries and commentaries raise a world of dust. You cannot ban commentaries as Justinian did—unsuccessfully.

Sir Frederick Pollock once described the Common Law as an "ungodly jumble". Whatever metaphor one may employ to describe the Common Law, it is a system, or, if you prefer, lack of system, which has to be reckoned with. Legal practitioners are very much in the position of the lady who told Carlyle, "I accept the universe", to which the pholosopher replied drily, "By God, you had better". Having accepted the Common Law, we may ask ourselves, is it as forbidding as all that? Decisions may be legion, and case-law a brambly wilderness, but experienced woodsmen are not dismayed by wildernesses. Armed with hatchets and spades, they effect clearings in the forest and hack their way through. Now and again, they may be held up but they persist in their job till their patience is rewarded and they see light.

To such a state of the law, can we apply the name of science? Whether the term is strictly applicable or not, the law is certainly a complicated craft and those who deal in it should be experienced craftsmen. Judges presumably are. (I am putting it in that half-bantering way, because I have in mind Bentham's gibe that ignorance of law is excusable only in lawyers and lawyers obviously include judges). Matthew Hale wrote long ago that judges were chosen for their learning, knowledge and experience of the laws of the land and for the reason that they were on their oath and bound to judge in accordance with the law. Such, doubtless, was the ground of selection of judges in other countries as well. The characteristics feature of the Common Law was that judges had to try cases and give their decisions guided by the reported cases. And, as was stated in *Rex* v. *Bambridge,* "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases". According to Sir Frederick Pollock, "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles recognised and applied as necessary grounds of the decision". The essence of the rule of *stare decisis* is that decided cases do govern in the sense that they furnish and illustrate "the principles which should guide the Courts in rendering judgment". It was a pregnant remark which Edmund Burke made: "to give judgment in private is to put an end to reports; and, to put an end to reports

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NOT TO BE REMOVED
DEPARTMENT OF LAW

is to put an end to the law of England,"—a contingency which we may be sure will never happen. In a very real sense, a judge is a law-giver, not, of course, in the sense that he makes it but in the sense that he ascertains it and gives authoritative expression to it. If the law is not equal to meet a new just it to the equities of the case. The judicial mind should possess the requisite resilience and adjust adjudications with a trained eye. A judge should remember that law, like literature, is an expression of life and that law was made for man and not man for the law, and he should endeavour to apply the fundamental principles of it to the changing needs of society and the new problems to which they give rise. Any good system of law should help a judge to do so. Mr. Justice Chandavarkar once remarked, when a Subordinate Judge gave a decision on the analogy of Roman Law, "It is doing scant justice to Hindu Law as a science that because there is no express text providing for a concrete point arising for adjudication therefore there is nothing in it to guide the judge in deciding the point and he must import analogies from foreign laws to help him". The capacity of any system of law to meet a new situation is evidence of its scientific character. It is significant that His Lordship did not interdict foreign aid, should the indigenous law prove unequal to the situation. India has borrowed freely from Britain, Britain from Rome and it is not uncommon for judges to derive inspiration and support from other systems than their own.

Each decision, in the words of Mr. Justice Cardozo, one of the most eminent of American judges, has a "generating power." It is a "fresh stock of descent". Lest we should be scared by the prospect of innumerable and, therefore, unmanagable progeny, Mr. Cardozo reassures us by saying that it is not all of them which grow to maturity and that quite a good number perish infancy. They alone survive which are fit to survive. And what is the test of fitness? The enshrinement in them of principles which hold good for all time or which are wide enough to cover new and unexpected changes in the life of a community. Those cases alone continue to hold the field which yield rules that subserve social ends and are approved by those learned in the law. The law changes but it does not change arbitrarily. It changes—mostly and on the whole—when the good of society demands it. As time advances, authorities are subjected to a process of erosion but the essential base remains. To vary the metaphor, there is a thread of gold which runs through the entire succession of decisions and it is the disentangling of that thread which the scientific study of the law enables us to accomplish.

This process of change, in answer to an imperious social need, can be discerned in the development of the law in all countries where the administration of justice has reached a high standard. Supposedly well-established legal doctrines frequently suffer a sea-change. Let us take an example, the law of negligence. The ground of liability, it is clear, is the duty to take care. And, what determines the existence or otherwise of the duty? It may be contractual, or it may arise from tort. The character of the tort which gave rise to the liability, in respect of an article dangerous in itself or which the defendant

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knew to be dangerous, was always understood to be negligence. But, it has recently been held that it also covers the case of a manufacturer who puts into the market goods guaranteed pure but which turn out to be deleterious. In *Donoghue* v. *Stevenson,* popularly known as the *"Snail-in-the-bottle" case,* the House of Lords, by a majority, held that the manufacturer, in such a case, was liable in damages for injuries caused in consequence of the consumption of such stuff. A lady ordered a drink of ginger-beer in a cafe and drank it and when there was a small quantity left, she observed a snail floating in it in an advanced state of decomposition. She became sick, developed entero-gastritis, and, on recovery, sued the manufacturer for damages. There was no contractual relation between her and the defendant. The drink was not dangerous in itself, and the manufacturer did not know it was. Lord Buckmaster held against the plaintiff and observed that it would be monstrous if every manufacturer should go about in hourly peril of being hauled up before a Court by any one of the million or more persons who may happen to consume a concoction of his. Lords Atkin, Thankerton and Macmillan had no compunctions whatever in holding that the manufacturer was under a duty to take care and that, in sending out deleterious stuff, he had failed in that duty and was liable in damages. All the judges were agreed that the Common Law was quite equal to meet new conditions but the disagreement was only as to its applicability to the facts of the case. Lord Buckmaster observed, "The law applicable is the Common Law and though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside its ambit". Lord Macmillan referred to the fact that the strictness of the Common Law had "already been mitigated in the public interest". He observed that "the categories of negligence are never closed" and that, in deciding a case, it was "the standard of the reasonable man" which had to be borne in mind and that "that criterion of judgment must adapt itself to the changing circumstances of life". Earlier decisions were reviewed and majority held that they did not bar the way to relief and added that, if they believed they did, they would not have hesitated to put them aside, I suppose, as they would have a disused garment. It appears that in ancient Babylon, the principle of liability for negligence was the same which commended itself to the house of Lords. Lord Buckmaster refers it and it is interesting—and I hope, sobering—to find the latest view coinciding with the ancient wisdom of the East.

It would be easy to multiply instances of such adjustment of the law to altered circumstances. At one time, contracts in general restraint of trade were condemned by the law. Partial restraints were permissible and, at one time, the area of restraint was confined to a parish and a short distance, say, half-a-mile, from it. But the times have changed. Improved communications have shortened space, and trades and businesses are now open to everybody alike, considerations which have sapped the foundations of the Common Law rule. The enforceable character of the restraint in a given case is judged by its reasonableness and, at the present day, the tendency is to widen the area of permissible restraint. In what is known as the *Nordenfelt case,* a covenant not to trade anywhere in England or Scotland was held justified. The reasonable man, that is, the man on the top of the Mylapore bus, is the guide-post to the law.

At the same time, we should remember that the man in the Mylapore bus is not always of the same mind and an excellent illustration is provided by the differences in the interpretation of the Sherman Act in the United States of America at the close of the century and in 1911. Disguise it how you will, the view as to what was permissible restraint had radically changed and the Courts gave judicial recognition to the changed view.

As I have already said, it is not always that the Courts can effect the necessary modifications of the law. Even equity, the time-honoured instrument in the hands of the Courts to mitigate the rigours of the Commin Law, hardens after a time, as it did in Lord Eldon's day. It loses its flexibility and becomes technical equity. It is then for the legislature to intervene and, by appropriate legislation, provide the remedy. Sometimes a rule gets firmly entrenched in the legal system and can be removed only by legislation. There was the well-known rule in *Shelley's case.* Whether we all understood its exact scope and meaning is more than I can tell. I never did. The rule had a long innings and succeeded in confounding lawyer and layman alike. When Lord Birkenhead appeared for the B.C.L. examination in Oxford, it appears that he was asked to state the rule. He bungled and missed a first class. Mortified, it is said he swore that when he should become the Lord Chancellor, he would abolish the rule. The story may be apocryphal but it did happen that the rule was abolished during his tenure of the Woolsack. The way had been prepared for its extinction by a gathering volume of opinion and, in particular, by the judgment in *Foxwell* v. *Van Gretten,* in which Lord Macnaughten had laughed the rule out of Court.

Another dieheard was the rule in *Merryweather* v. *Nixan.* Under that rule, it was not open to a tortfeasor to claim contribution from a joint tortfeasor. It was based on a judgment which did not commend itself to succeeding generations of judges. It was the law only in England and the Courts declined to regard it as part of the law of Scotland. But it continued to vex and annoy English judges till it was abolished by statute in England in 1935.

During the last one hundred years and more, there has been a regular spate of legislation in England, in almost every branch of the law. The increasing complexities of human relationships and a liveller social conscience have led to numerous enactments covering almost every field of national endeavour. Relief to debtors, the regulation of the relations between labour and capital, Workmen's Compensation, accidents at sea, submarine and aerial navigation, commercial transactions in their expanding spheres have all been the subjects of parliamentary legislation.

Thus the law changes when there is need of change but it does not change overnight. Various influences retard the pace of reform. Vested interests, inertia and ingrained conservatism bar the way. However, once dissatisfaction sets in, the foundations of an obnoxious law came to be slowly undermined and one day the crash comes. The reform of the English land law furnishes a good example of the process. Sir William Holdsworth, has shown in one of his papers, how a growing sense of the need of reform expressed itself, from time to time, in tentative, half-hearted measures. Commissions sat and sat but did not come to grips with the problem. They treated the symptoms but did not tackle the disease. They tinkered with Conveyancing and the Registration of Titles. All that meant only marking time and led nowhere. What was required was a drastic revision of the substantive law. Dicey had summed up what he called the paradox of the law in this way. "The constitution of England has, while preserving monarchical forms, become a democracy, but the land law of England remains the law appropriate to an aristrocratic State". The paradox, according to Sir William Holdsworth, had become too glaring, and then the First World War came on, and things could not be put off any longer. A Royal Commission had been at work and it recommended radical changes which were embodied in the Property Acts of 1925. These Acts may not be the last word in legislative wisdom but they are the result of years it patient research by men to whom the law was something which should be dealt with on a high scientific plane. These men knew the historical process, had a correct comprehension of causes and could draw upon the experience of the past. Thus, they were able to diagnose the malady and provide the appropriate remedy. Indeed, the medical metaphor is not inapt. Medical science is concerned with bodily health and the treatment of bodily ills. The law is concerned with the well being of society and the maintenance of social health. And when social ills develop or become deep-rooted, it has to devise drastic remedies.

That's where, as I have said, the legislature comes in. Parliamentary legislation in England is not open to review by the Courts but it is, where, as in India, the powers of Parliament are defined. Adjudications on impugned legislation—whether original or delegated—is a common feature of our Courts. This power of judicial review would have delighted the heart of Lord Ellesmere, who lamented, in the *Earl of Oxford's case,* the absence of such a power. He quoted Coke, and observed, "Statutes are not so sacred that the equity of them may not be examined..... And yet, our books are that the acts and statutes of Parliament ought to be reversed by Parliament only". An assembly of wise men, who have their fingers upon the pulse of society, may be expected to promote legislation only when, and to the extent, it is called for in the public interest. However, even such an assembly is not infallible and, where the Courts have a power of review, it will provide a system of check and counter-check which will prove beneficial.

One thing which stands out in the India of the present day is the immense output of legislation. Revolutionary changes are being wrought in the law and that at breathless speed. That does not mean that all or even much of it is ill-conceived. One cannot, unless one is a crass conservative, blink the fact that some ancient wrongs still persist and need to be removed. All the same, one sometime wishes that our legislators hastened a little more slowly. Legislation is a tricky business. It is a science in itself and ought to be in the hands of experts. In a speech which the Attorney-General delivered at Ootacamund last summer, he reminded us that "law was made by officials sitting in the Secretariat, which meant giving more power to the Executive". Which, it goes without saying, the Executive won't mind. They rather revel in it. Doubtless, they do a good job according to their lights but they fancy themselves infallible. They have a rooted distrust of lawyers. The explanation of such an attitude was given many years ago by Lord Morley. He said their objection was not to lawyers but to law.

The malady is not peculiar to India. Sir Henry Slessor, in commenting upon war-time legislative interference with individual rights, observed, "It has been said law formerly paralysed administration; to-day public administration is likely to strangle law". We need a *tertium quid*—an impartial outsider to hold the balance and that role can be filled only by the judiciary.

This quality of impartiality comes natually to a judge who is rooted in the fundamentals of the law. It is a part of his training, to keep a cool head and to steer his course by little save the established landmarks of the law. In that ideal the West and the East have concurred, in the old days and new.

Pontius Pilate, not an agreeable character by any means, upheld the law in trying circumstances. Lord Shaw of Dunfermline, in a remarkable study of the Trial of Jesus Christ, has sketched how the Sanhedrin flouted the Jewish traditions of a fair trial, since embodied in the Talmud. Under that law—as in ours—an accused person could not be condemned out of his own mouth. But this salutary safeguard was ignored and Jesus was questioned by his accusers and, on his answers, they pronounced him guilty—when he was not. However, the Sanhedrin could not pass sentence of death, and they remitted the case to Pilate, the Roman Governor. Pilate had a bad record, but he knew his law. He saw that the trial was riddled with irregularities—illegal arrest, trial by night and inadmissible evidence. All that was obnoxious to the Hebrew Law and the jurisprudence of Rome. A defiant mob was at his gates, clamouring for the blood of Jesus, but Pilate had no hestitations whatever. He quashed the proceedings. At that moment he upheld the majesty of the law and vindicated the right of the subject to its protection. The distinguished lawyer, whose name this endowment bears, has recorded in his reminiscences one instance of a conviction for murder, based solely on the confession—twice retracted—of an approver, who further broke down completely under cross-examination. It was left to the Privy Council to set aside the conviction with a few pungent remarks on the course which the trial had been allowed to take. That was not an isolated instance and the Indian Law Reports contain many instances of trials where the principles of natural justice were disregarded, rendering it necessary for the higher Courts to interfere to set matters right. All this is as familiar to us as the palms of our hands and bred in us an invincible faith in the law and its machinery.

The mechanism of the law is complex and those charged with running it should know every nut and bolt and cog of it. They should know it as a horseman knows his horse or a seaman his ship, its moods, its temperament and every twist in its nature. And that is why the man in the street feels that when things go wrong there ought to be a writ about it, even as an Englishman would say there ought to be a law about it. Mr. Justice P. Rajagopalan mentioned it the other day in the course of an admirable address which he delivered at the Annamalai University, stressing the need to maintain the Rule of Law unimpaired. The reaction of the man in the street is born of his inbred faith in the law, which is his richest inheritance from the past. It has become part of his mental texture and the way it was woven is a matter of history, philosophy and scientific method. And so long as that delicate mechanism lasts, the law will be able to hold its own. On that optimistic note, and with a word of thanks for the kind way in which you have listened to me, I shall end this paper.

THE

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LATE MR. N. CHANDRASEKHARA AIYAR.

It is with profound sorrow that we record the death at the age of 69 of Mr. N. Chandrasekhara Aiyar on the morning of 31st March, 1957.

In his death, very many of us have lost an old and tried friend, the profession and the judiciary an eminent member and the country a great citizen.

Well deserved tributes to his work and eminence as an Advocate and Judge were paid at the time of his retirement from the Madras High Court in January, 1948. We need only refer to (1948) 1 M.L.J. 31 (Jour.). At the time of his retirement he himself stated: "Men of true culture, high character and lofty attainments must man the highest Court in the land, for it is only then that standards would be set up and examples furnished which would elevate and purify not merely the legal atmosphere in Courts of Law and Justice, but also the general level of society in the much wider sphere around". Who can say that he himself has not fulfilled this in an ample measure? But his work after his retirement has been even more significant and we will now confine ourselves to certain marked features of his life and character.

He became a Member of the Banks Dispute Tribunal and was India's representative in the Indo-Pakistan Boundary Commission presided over by Lord Justice Bagge. His work on the Commission has been very highly spoken of by our Prime Minister. Later he was appointed a Judge of the Supreme Court in 1950 and retired therefrom in January, 1953. Immediately he became the Chairman of the first Delimitation Commission in which capacity he toured the length and breadth of India and made many friends. His services were again availed of for short periods by the Supreme Court on two occasions. He also presided over the second Delimitation Commission which work he completed in record time in December last to enable the recent elections to be held.

Whichever Office he held and he had held many, he filled them with great distinction and ability. Literary attainments, legal practice and reputation, judicial pomp and power have all sat on him lightly. He was a universal favourite and radiated joy and good cheer all round and any one who came into contact with him was charmed with his personality and bubbling affection. He moved freely with all, high and low, rich and poor, old and young and put every one at ease. He was frank and outspoken and a man of great sincerity and genuine affection. He had the rare gift of making friends and the rarer gift of retaining those friendships by his own loyalty and steadfast attachment. A more genial companion and a truer friend it was hard to find. He leaves a host of friends throughout the length and breadth of the country.

While pious and deeply religious he had broad and catholic tastes and adjusted himself to modern conditions of life. He was a fine example of plain living and high thinking with utter disregard to conventions and the trappings and forms of appearance. He was essentially a man of faith deeply rooted in the traditions of Indian Culture. He adhered strongly to the values and principles of life. He was a great example of the Guru Sishya Bhava and his devotion to Their Holinesses the Jagadgurus of Sri Kanchi Kamakoti Peeta and the Sringeri Mutts and to his Master Dr. C. P. Ramaswami Aiyar is well known.

He was a keen sportsman and played cricket both on and off the field, and a great lover of children and the children loved him. It was a delight to see him with them. He was a good conversationalist and an ardent lover and keen student of Sanskrit and English literature. He was connected with many Educational and literary efforts and in particular with the establishment of the Vivekananda College, Madras. He was one of the Joint Editors of the Bhavan's Book University Series to which he himself contributed the volume 'Valmiki Ramayana'. He edited the Eleventh edition of Mayne's Hindu Law and contributed to many journals, literary and philosophic. He had indeed a flare for journalism.

We cannot do better than conclude in the words of our respected Sri M. Venkatasubba Rao: "He was a staunch and warm friend. I would eagerly look forward to the sunshine of his company, for his bonhomie and sparkling good humour drew my unstinted affection for him. His integrity, glow of faith, deep piety and extreme humility were to me an inspiration. He served his country in several capacities but his importance was not the automatic result of his having held positions of great responsibility but which flowed naturally from his simplicity, sincerity and great charm. His passing away leaves the country poorer, and an aching void for his friends which cannot be easily filled".

It is truly hard to find the like of him.

THE HINDU SUCCESSION ACT AND ALIYASANTHANIS

By

B. Padmanabha Holla, *Advocate, Mangalore.*

A new Act always gives rise to a lot of speculation as regards the rights created thereunder. The Hindu Succession Act, 1956, is no exception. Sections 7 (2) and 30 of this Act are two of the most controversial sections. They run as follows :—

Section 7 (2).—When a Hindu to whom the Aliyasanthana Law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an *undivided interest* in the property of the kutumba or kavaru, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to Aliyasanthana Law.

Explanation.—For the purposes of this sub-section, the interest of a Hindu in the property of a kutumba or kavaru shall be deemed to be the share in the property of the kutumba or the kavaru, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the kutumba or kavaru, as the case may be, then living, whether he or she was entitled to claim such partition or not under the Aliyasanthana Law, and such share shall be deemed to have been allotted to him or her absolutely.

Section 30.—*Testamentary Succession* :—

(1) Any Hindu may dispose of by will or other testatmentary disposition any property which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation.—The interest of a male Hindu in a Mitakshara co-parcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba, or kavaru, shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-sections.

The Courts for the interpretation of statutes have evolved what are known as canons of construction. Four of these canons which could usefully be applied here are set down herebelow :

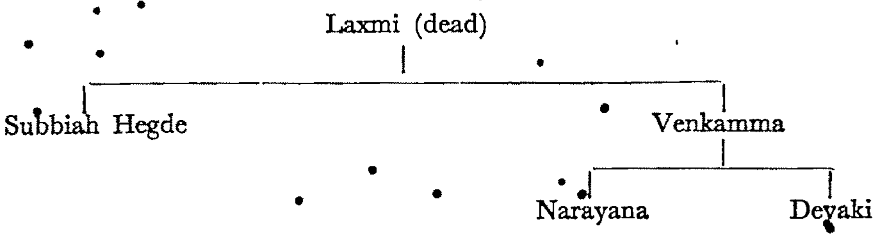
(1) When the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions.

(2) It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself.

(3) A recognised canon of construction is that the same expression must have the same meaning, wherever its occurs in the same Act, unless the context definitely points out otherwise.

(4) The true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the statute.

Section 7 (2) deals with intestate succession. To facilitate understanding, a hypothetical family as the following, may be taken as an example :



If Subbiah were to continue joint with the rest of the family till his death and if he were to die hereafter, his " undivided interest," namely, one-fourth of the family properties, there being four members in the family, would devolve on his personal heirs by intestate succession.

What would, however happen, if he were to become divided during his lifetime according to the Madras Aliyasanthana Act, 1949 ? Under section 36 (2) (*b*) of the Act of 1949, his share is 3/8ths. Would this share, which is an enlarged share, also devolve by intestate succession under section 7 (2) of the Hindu Succession Act ? The answer appears to be clear. Section 7 (2) according to the plain meaning of the words of the section itself provides only for the devolution of an " undivided interest." The interest of a member who has claimed partition cannot by any stretch of imagination be deemed an " undivided interest." Therefore the interest of a divided member must descend according to the Madras Aliyasanthana Act and his wife and children do not succeed to that interest. It may, however, be urged that as Subbiah Hegde by himself constitutes a kavaru, he has an " undivided interest " in the property of a kavaru, though he has separated from the branch of Venkamma. This argument cannot be countenanced. To have an " undivided interest," there must be at least two people in a kavaru or kutumba. It cannot be said that the sole member of a kavaru or a kutumba has only an " undivided interest " in the property of the kavaru or the kutumba. He does not share that " interest " with anybody else. Obviously, the legislature has not provided in the present Act for the devolution of the share of a divided member. That devolves, therefore according to the Madras Aliyasanthana Act.

Section 30 happens to be the more controversial section. Under the Malabar Wills Act, 1898, an Aliyasanthani could dispose of by will his separate or self-acquired property. Section 30 without the *Explanation* only reiterates this power. The adding of the *Explanation*, however, now makes all the difference. An Aliyasanthani now could dispose of by will his "interest in the property of a kavaru or kutumba." There is a conflict of views as regards the definition of this "interest" which could be bequeathed by will. The questions that arise for consideration may be formulated thus and they are two :—

(1) What is the quantum of interest that could he bequeathed by a member like Subbiah Hegde who at the time of his death is joint with the rest of the family ?

(2) Whether a member after getting divided according to the Madras Aliyasanthana Act, is competent to execute a will; if so what is the quantum of interest that could be bequeathed?

It may not be quite difficult to answer the first question. In the example given above, Subbiah Hegde, were he to continue joint with the rest of the family till his death, could execute a will. Being undivided, he has an interest in the property of a kutumba, within the meaning of the Act. But what is the quantum of interest that he would bequeath? Is it 1/4th according to section 7 (2) of the Hindu Succession Act or 3/8th according to the Madras Aliyasanthana Act? It is in this connection that the canons of construction set out above may be applied here. The same expression must have the same meaning throughout a statute, and a word or a phrase must be considered in the light of the general purpose of the Act itself Though in section 30 there is no definition of "interest" as is contained in the *Explanation* to section 7 (2), there is no reason to think that the legislature intended to give two different meanings to the word interest in the two sections. Further there is a strong indication in section 7 (2) that the legislature intended to give only one meaning to the word interest throughout the Act. Section 7 (2) itself lays down that the "undivided interest" as defined in the *Explanation* to that section, shall devolve by testamentary or intestate succession under the Act. Hence it is the same interest or the same share that devolves both by testamentary or intestate succession. In other words, to come to the example, Subbiah Hegde's 1/4th share, were he to leave a will, would go by that will; and not the 3/8th share which he could get under the Madras Aliyasanthana Act.

The second question is not so easily disposed of. Could a divided member execute a will? Could a divided member be deemed to have an "interest in the property of a kavaru or a kutumba"? It is clear that if Subbiah Hegde were divided it could never be said that he has the "interest of a member of a kutumba or kavaru." It is the meaning that is to be attributed to this expression "interest of a member of a kutumba or a kavaru" that will give a clue to the answer to the second question. It is well settled that a member separating from the rest of the family is a kutumba by himself. This is made clear in section 35 (2) of the Madras Aliyasanthana Act which runs as follows:—

"The share obtained by the kavaru shall be taken by it with all the incidents of kutumba property."

Whenever there is a partition either under the Madras Aliyasanthana Act or otherwise, community of interest is put an end to between the separating member and the rest of the family. His share upon his death does not survive to the rest of the family; but will pass under law by inheritance. The separating member has no hold on the rest of the family in the matter of the management of the properties allotted to them; nor has the rest of the family any hold on the separating member. This would not be the position if the separating member is to be considered a "member of the kutumba or a kavaru" even after partition. A "member of a kutumba or a kavaru" has under law certain well-established rights and liabilities. Upon a partition, these rights and liabilities are put an end to and the status of a separating member is changed into that of a kutumba. In short, the separating member ceases to be a "member of a kutumba or a kavaru" and therefore *a fortiori*, his interest in the property acquired as a result of a partition can never be considered the "interest of a member of a kutumba or a kavaru". To hold otherwise would be to do violence to the language, the legislature has deliberately employed. The meaning of the expression "interest of a member of a kutumba or a kavaru" should be given due weight to. If that be so the interest of a divided member, it is clear, is not property that an Aliyasanthani could dispose of by will. There is also another indication in the *Explanation* to section 30, to show that the "interest of a member" means the interest of an undivided member: The first part of the *Explanation* deals with "the interest of a male Hindu in a Mitakshara co-parcenary property." Now this interest of a male Hindu can only mean an undivided interest in co-parcenary property. As regards a "divided interest" a male Hindu, even under the prior law, could execute a will. By merely sending a registered notice, a co-parcener could become divided and thereafter even though the properties were not divided by metes and bounds, he could dispose of this "divided interest" by will. It cannot be said that the legislature was unaware of the right of a co-parcener to execute a will in respect of this "divided interest" under the prior law. So the legislature must be deemed to have incorporated the *Explanation* only to confer rights not previously existing. Without claiming a partition, a co-parcener had previously no right to dispose of his "undivided interest" by will. Section 30 read with the *Explanation* now confers such a right. If therefore the "interest" of a male Hindu means the "undivided interest" of a male co-parcener, the expression "the interest of a member of a kutumba or a kavaru" must be interpreted in the same way and must be construed to mean the "undivided interest" of a member.

It cannot also be urged that in the example given above, Subbiah Hegde, supposing he has claimed his share under the Madras Aliyasanthana Act, still has the "interest of a member of a kutumba or kavaru", which he could dispose of by will. For the various reasons stated already, to have the interest of a member, there must be at least two people in a kavaru or kutumba. Subbiah Hegde, being only a single individual, after partition, is the kavaru itself and to be more accurate in the eye of the law after partition he constitutes a separate kutumba. Thus as he has not the "interest of a member" after partition, his divided interest cannot be the subject-matter of a testamentary disposition.

The expression "Notwithstanding anything contained in this Act or in any other law," found in the *Explanation* cannot alter the above conclusions. For one thing, this expression cannot alter the meaning of the words the "interest of a member of a kutumba or a kavaru". By no stretch of imagination, even taking into account the expression "nothwithstanding anything contained in this Act", the "interest of a member" could be construed to mean the "interest of a divided member." This itself must be sufficient to dispel all arguments built upon the slender expression "notwithstanding, etc." For another thing, this expression "notwithstanding, etc." at first appears to have the effect of overriding the earlier sections, in particular section 7 (2). But if carefully examined, there is really no conflict between section 7 (2) and section 30. Section 7 (2) itself speaks of testamentary succession and this is provided for in section 30. The conflict is more imaginary than real. Section 7 (2) provides for intestate succession in respect of the "undivided interest of a member". For the various reasons noted above, section 30 enables disposition by will of the very same "undivided interest." When there is no conflict, there is nothing to be overridden. What, however, is really overridden is the prior law to which reference is made in the expression "nothwithstanding anything contained in any other law." The undivided interest of a member of a kavaru or kutumba could not be dealt with under a will previously. The present Act confers that right now. To that extent only there has been a departure from the previous law. Hence the clear answer to the second of the questions postulated appears to be that the "interest of a divided member" cannot be the subject-matter of a testamentary disposition.

A CRITICAL NOTE ON STATE OF MADRAS *v.* V. SWAMINATHAN, (1955) 2 M.L.J. 178.

By

C. V. Ramanujachari, *Bangalore.*

The decision of His Lordship Mr. Justice Mack, appears to be wrong and requires reconsideration. A person claiming to be a ryot in an estate within the meaning of the Madras Estates Land Act tried to get a ryotwari putta, in respect of the said land, from the District Collector and the Board of Revenue, after the said estate was abolished under Act XXV of 1948. Having failed to get the putta, he filed a suit in the District Munsiff's Court of Madura Taluq for a declaration that it was his ryoti land. His Lordship Mack, J., has held that the plaint is not maintainable in the Civil Court and should be dismissed. The main or fundamental reason on which the said conclusion of the learned Judge is based is set out at page 179, where it is stated thus :—"The Estates' Abolition Act (XXVI of 1948) casts upon all applicants who consider themselves entitled to a ryotwari putta to make an application to the Settlement Officer, whose order is subject to appeal and revision as provided for, by the Act." Again at the same page, it is stated "It is the Settlement Officer, in the first instance that should decide, in accordance with the statutory requirements of the new Act, whether a person is entitled to a ryotwari putta". Again at page 180, His Lordship concludes by saying that the plaintiff is referred to his remedy by way of an application under section 11 of the Act. Sections 11, 12, 13, 14 and 15 of the Act are the relevant sections. Section 11 declares that ryots are entitled to a ryotwari putta, in respect of certain lands. It does not contemplate any application by them. In respect of landholders, sections 12, 13 and 14 declare when the landholders (*i.e.*, ex-landholders) are entitled to ryotwari puttas. But by section 15 which authorises the Settlement Officer to decide the question, in express terms is confined only to sections 12, 13 and 14, *i.e.*, the power to decide whether the applicant is entitled to a ryotwari putta or not is confined only to landholders whose estates have been abolished. It is only in such cases, the Settlement Officer is given the jurisdiction or power to decide, if they are entitled to such a putta. Section 15 (1) is express and definite on the point. Nowhere in the Act is the Settlement Officer given jurisdiction or power to decide the right of persons other than ex-landholders to a ryotwari putta. Even section 15 (2) confines the right of appeal to questions decided under sections

12, 13 and 14 of the Act. Nowhere is it stated in the Act that the Settlement Officer has power to decide the right of a ryot to a ryotwari putta. His Lordship erred in misreading section 15 (1) and (2) of the Act. Neither by express terms nor by necessary intendment has the jurisdiction of ordinary Civil Courts been ousted in respect of a suit by a ryot that a land is his ryoti land. The Act does not cast upon all applicants to a ryotwari putta to go to the Settlement Officer, in the first instance; such a duty is cast and is limited only in the case of ex-landholders. The Act makes a distinction in this respect between ryots who were entitled to puttas even before the Act and the ex-landholders who were not so entitled, before the Abolition Act. His Lordship has ignored this well-justified distinction and hence his conclusion is incorrect. After all, the Settlement Officer is created under section 5 (1) of the said Act, being a statutorily created officer, his powers are limited by the provisions of the said statute and as provided by section 5 (1) his duties and functions are only those assigned to him by the said statute.

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SOME REFLECTIONS ON THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

By

PROFESSOR S. VENKATARAMAN.

Little is to be found in the works on Hindu Law on the subject of guardianship. The matter was regulated principally by statutes and in some measure by principles of justice and equity. Minority under Hindu law terminated at the age of sixteen. A youth who hadnot reached that age was called *poganda* (पोगंड) Whether it was the commencement of the sixteenth year or its completion that terminated minority has been the subject of a difference of opinion. In Madras, it was held in a fairly recent decision that minority came to an end only on the completion of the sixteenth year and that the rule applied equally to males as well as females, *Aravamudha Iyengar* v. *Ramaswami Bhattar*[1]. According to the Sastras the king's duty to protect his subjects carried with it the jurisdiction to protect the estates of infants and other persons unable to take care of their interests[2]. This principle is somewhat analogous to the doctrine of English law of the king being *parens patriae*. The duty was necessarily delegated to the child's relations. Hindu law as administered by the British Indian Courts had regarded the parents alone as the natural guardians of a minor. Of the two parents the father came first and in his absence the mother fulfilled that position. Where both the parents were dead, no other relation of the child, not even the paternal grandfather can be regarded as the lawful guardian of the minor without an order of the Court, *Chennappa* v. *Onkarappa*[3], *Subbarami Reddi* v. *Chenchu Raghava Reddi*[4]. The father's power was held to extend to his appointing by his will a guardian of the person of the child even excluding the child's mother, *Amirthavalli Ammal* v. *Sironmani Ammal*[5]. He may also by will appoint a guardian for the property of a minor child other than his interest in undivided joint family property, *Chidambaram* v. *Rangasami*[6]. A mother cannot, however, appoint a testamentary guardian for her minor child, *Venkayya* v. *Venkata*[7]. Under the Guardians and Wards Act, 1890, the Court is given power to appoint or declare a person as the guardian of the person of a minor except where the father himself is living and is not unfit to be such a guardian[8]. The Guardians and

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[1] (1952) 1 M.L.J. 251, 264.

[2] Manu VIII, 27, 30; Gautama X, 48.

[3] I.L.R. (1940) Mad. 358 (F.B.).

[4] I.L.R. (1945) Mad. 714.

[5] I.L.R. (1938) Mad. 757.

[6] (1918) I.L.R. 41 Mad. 561 (F.B.).

[7] (1898) I.L.R. 21 Mad. 401.

[8] Sectiou 19 (b).

Wards Act left unaffected the powers of the natural guardian only in certain matters, such as the right of the father to appoint a testamentary guardian[1] subject however to the Court's power to remove such person ;[2] the right of the father or husband to be the guardian of the person of the minor provided he is not unfit. The appointment of a guardian under section 7 of the Act operated to supersede the natural guardian and the powers of the latter will not revive even on the death or the removal of the Court guardian, *Jiban Krishna* v. *Sailendranath*[3]. In appointing a guardian the Court shall have the welfare of the minor as the paramount consideration[4]. Hindu law recognised also *de facto* guardians. A *de facto* guardian is one who not being a natural, testamentary or Court guardian of a minor has, yet, being interested in the minor, taken charge of the minor's property and displayed a continuous course of conduct as guardian, the acts being neither fugitive nor isolated, *Palaniappa Goundan* v. *Nallappa Goundan*[5].

The Hindu Minority and Guardianship Act, 1956, is intended to amend and codify *certain parts* of the law relating to minority and guardianship among Hindus[6]. The pre-existing law was a compound of sastraic rules, usages, English law and the provisions of the Guardians and Wards Act. What parts of such law are actually affected by the present legislation is a question fraught with uncertainty and will remain the subject of controversy. Two provisions in the Act have a bearing on the matter. Section 5 provides that so much of Hindu law or custom or usage as relates to any matter provided in the Act shall cease to have effect. It also provides that so much of any other law in force at the commencement of the Act as is inconsistent with any of the provisions of the Act shall cease to have effect. Section 2 states that the Act is supplemental to the Guardians and Wards Act, 1890 and does not derogate from the provisions of the latter Act except to the extent expressly provided in the present Act. Section 4, clause (*b*) defining a guardian states that a 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property. This is identical with the definition contained in section 4 (2) of the Guardians and Wards Act. At more than one place, however, the present Act states that its provisions will not cover a minor's interest in undivided joint family property[7]. The Act also steers clear of guardianship for purposes of marriage. That seems to be kept distinct and is dealt with in section 6 of the Hindu Marriages Act, 1956. The present Act contains only a passing reference to the subject. Section 13 (2) lays down that no person shall be entitled to the guardianship of a minor by virtue of any law relating to guardianship in marriage among Hindus if the Court is of opinion that such person's guardianship will not be for the welfare of the minor. Nor has the present Act any direct concern with guardianship for purposes of adoption. Section 9 of the Hindu Adoption and Maintenance Act of 1956 lays down that in the absence of the father or mother, a testamentary guardian or a Court guardian may give a minor in adoption with the previous permission of the Court.

A somewhat interesting question is as to the effect of the present Act on the Indian Majority Act in so far as it concerns the definition of a minor. Section 4, clause (*a*) states that 'minor' means a person who has not completed the age of eighteen years. Section 3 of the Indian Majority Act provides that every minor of whose person or property or both a guardian has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by the Court of Wards before the minor has attained that age, shall notwithstanding anything contained in the Indian Succession Act or in any other enactment be deemed to have attained his majority when he shall have completed the age of twentyone years and not before. The marginal heading of the section is "Age of majority of person domiciled in India". *Prima facie* this rule applies to all the Hindus domiciled in this country. The question is whether the prolongation of minority till the completion of twentyone years in the two specified cases will continue to operate in regard to Hindus in view of the unqualified definition of a 'minor' in section 4, clause (*a*) of the present Act. It is useful to note that section 4 (1) of the Guardians and Wards Act states that a 'minor' means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. In as much as the present Act is to be read as supplemental to and not as derogating from the provisions of the Guardians and Wards Act save as otherwise expressly provided, and inasmuch as there is no *express* repeal or modification in the present Act of the definition of a 'minor' as given in the Guardians and Wards Act it looks as if that provision still holds the field, and accordingly, minority will stand extended till the completion of the twentyfirst year in the two cases mentioned in section 3 of the Majority Act. This view is consistent with the presumption against implicit alteration of laws. Maxwell states the principle thus[1]: "One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words beyond the immediate scope and object of the statutes. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". Lord Goddard, C.J., has observed to the same effect in *National Assistance Board* v. *Wilkinson*[2]. He said: "But it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet* v. *Leman*[3], Sir John Romilly M.R. stated as a principle of construction which could not be disputed that the general words of the Act are not to be construed as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched". The rule in section 3 of the Majority Act must be deemed to embody the policy of the law relating to minority in this country and so cannot be held to be modified or affected by the definition of the term 'minor' in the present Act.

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[1] Section 6.
[2] Section 39.
[3] A.I.R. 1946 Cal. 272, 274.
[4] Section 7 and 17.
[5] (1951) 1 M.L.J. 265.
[6] Preamble.
[7] Sections 6, 9 and 12.

A noteworthy feature of the present enactment is that the mother is placed almost on a footing of parity with the father[4]. As between the two it is true that the father has still priority. The custody of the child will ordinarily remain with the mother only if the child has not completed five years of age. Also the father cannot by his will appoint a guardian so as to derogate from the mother's right of guardianship.[1] And in the case of illegitimate children it is the mother that is the preferential guardian[2]. The mother also is given the power to appoint a testamentary guardian.

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[1] Interpretation of Statutes, 10th edn., page 81.

[2] L.R. (1952) 2 Q.B. 648, 658.

[3] (1855) 20 Beav. 269 : 52 E.R. 606.

[4] Section 6.

Under the earlier law conversion of the father to another religious faith would not affect his rights of guardianship over his children by reason of the provisions of the Caste Disabilities Removal Act (XXI of 1850), *Muchoo* v. *Arzoon*[3], *Sham Singh* v. *Shantabai*[4]. The principle had operated to the extent of holding that a Hindu father who becomes a Christian is entitled to say in what religion his child is to be brought up, and the Court will interfere only if it would be injurious to give effect to such direction in the interest of the minor, *Rev. Dr. Albrecht* v. *Bathee Jellammal.*[5] Section 6 of the present Act expressly lays down that no person shall be entitled to act as the natural guardian of a minor if *he* has ceased to be a Hindu. Though the section uses the term ' he ' the bar enacted by the section will equally govern the case of the mother becoming a convert from Hinduism to some other religion.

Under the earlier law while in the case of the father remarriage would not in any way affect his guardianship rights over his children by the first marriage, in the case of the mother, her preferential right of guardianship of her children by the first marriage will be lost on her subsequent remarriage, *Ganga Prasad Sahu* v. *Jhalo*[6]. There is however nothing either in Hindu law or in the Hindu Widows Remarriage Act making it obligatory for the Court to remove her from the guardianship. The present Act contains no provision covering the question.

The husband, if major, is the guardian of the wife irrespective of whether she has attained puberty or not. Minority of the husband himself will be no bar to his acting as the guardian of the person of his minor wife or child[7], nor can a husband's right to be such guardian be taken away unless he is unfit.[8] After the passing of the Hindu Marriage Act the contingency of the husband being a minor cannot ordinarily happen inasmuch as one of the conditions of a valid marriage is that the bridegroom should have completed eighteen years of age at the time of the marriage. There is no change in the position now.[9] The present Act is silent on the question as to who is the guardian of the person or property of a minor widow or divorcee. Presumably in such cases the legal guardian can only be a person appointed by the Court. In fact, it is the general rule that in the case of married woman, in default of the husband, no other person is entitled to be her legal guardian unless by appointment of Court, *Ethilavulu Ammal* v. *Pethakkal*[10].

Even under the Guardians and Wards Act, no guardian for the property of a minor can be appointed by the Court where the minor is a member of an undivided family governed by the Mitakshara law, Marumakkatayam or Aliyasantana law for the reason that the minor's interest is not his individual property. The High Court had, however, inherent jurisdiction to appoint a guardian even where the minor's property is an undivided interest in joint family property, *Mahadeo Krishna Rupji, In re*[1]. In *Raja of Vizianagaram* v. *Secretary of State for India*[2], the Madras High Court has held that under clause 17 of its Letters Patent the High Court has such jurisdiction in respect of minors in the mofussil as well. The present Act preserves the earlier law. While providing generally that no guardian shall be appointed for the minor's undivided interest in joint family property, section 12 expressly lays down that " nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest".

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[1] Section 9.
[2] Section 6.
[3] 5 W.R. 235.
[4] (1901) I.L.R. 25 Bom. 551.
[5] (1912) 22 M.L.J. 247.
[6] (1911) I.L.R. 38 Cal. 862.
[7] Section 21, Guardians and Wards Act.
[8] Section 19, *Ibid.*
[9] Section 10, Hindu Minority and Guardianship Act.
[10] (1950) 1 M.L.J. 76.

Under the Hindu law the powers of a guardian to bind his ward by his acts had been discussed as early as *Hanuman Persaud's case.*[3] It was held that it was a limited and qualified power which can be rightly exercised only in a case of need or benefit to the estate. The touchstone of authority was necessity or benefit. In *Waghela Rajsanji* v. *Shekh Masludin*[4], it was stated by the Judicial Committee that it would be a very improper thing to allow a guardian to make covenants in the name of the ward so as to impose a personal liability upon the ward, and to do so will be to act in excess of his powers. The effect of this decision was considered to be that it did not affect the Hindu law liability of the minor, that where a guardian had borrowed money on behalf of the minor but had not charged the minor's estate no decree could be passed against the minor on his attaining majority or against his estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the Hindu law, and that where the debt had been contracted by the guardian for the marriage of the minor's sister a decree could be passed against the estate of the minor. *Patchu Rama Jogayya* v. *Vajjula Jagannadham*[5]. It was also pointed out in *Annamalai* v. *Muthuswami*[6], that the liability of the estate, though personal in the English law sense of the word, is not personal in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only. The decision of the Judicial Committee in *Subramaniam* v. *Subba Rao*[7] lends support to the view that the validity of the acts of the guardian of a Hindu minor whether by way of dealings with his property or by way of contracts on his behalf would fall to be judged by the test laid down in *Hanuman Persaud's case*[3], whether the guardian has been functioning within the scope of the doctrine of legal necessity or benefit of the estate. The principle stated in Pollock and Mulla's Indian Contract and Specific Relief Acts[8] that, if the contract entered into by the guardian on behalf of the minor is one which is within the competency of the guardian to enter into on his behalf so as to bind him by it and further if it is for the benefit of the minor, it may be specifically enforced against the minor, was approved. In *Sitarama Rao* v. *Venkatarama Reddiar*[9] a distinction is drawn between contracts to sell and contracts to purchase property made by a guardian on behalf of a Hindu minor, and it is considered that the former may be specifically enforced against the erstwhile minor if at the time they were made they were beneficial to the minor, but that the latter cannot be enforced by the minor on attaining majority. A Full Bench of the Andhra High Court has, however, in *Suryaprakasam* v. *Gangaraju*[1] held that there cannot be any essential distinction between a contract of sale and a contract of purchase and that both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law. The present Act defines the powers of a natural guardian in section 8. That section provides in sub-section (1): "The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor, or for the realisation, protection or benefit of the minor's estate; but the guardian can *in no case* bind the minor by a personal covenant". The first part of the clause seems to be but a reproduction of the rule laid down in *Hanuman Persaud's case.*[2] The concluding sentence is, however, likely to be a source of conflicting opinions, particularly in regard to the scope of the words 'in no case'. If strictly construed, they will mean that personal covenants will in no circumstance bind the minor, and even if loans have been taken from third parties on behalf of the minor and applied for legitimate purposes they could not be directly enforced against the minor's estate. The guardian alone will be liable on the contract and will have to look to the minor's estate for reimbursement on principles analogous to those which operate in the case of a trustee *vis-a-vis* the beneficiary. The section has not contributed to clarity. Sub-section (2) prohibits any disposal of the minor's property by way of sale, exchange, gift, mortgage, charge, or lease for a period exceeding five years or extending beyond one year after the minor attaining majority, without the previous permission of the Court. Section 9 provides that the powers of the testamentary guardian shall be the same as those of a natural guardian to such extent and subject to such restrictions, if any, as are specified in the Act and in the will. Under section 8 the Court shall not accord permission to the disposal of property unless necessity or *evident* advantage to the minor is made out.

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[1] I.L.R. (1937) Bom. 432.

[2] I.L.R. (1937) Mad. 383.

[3] (1856) 6 M.I.A. 393 (P.C.).

[4] (1887) L.R. 14 I.A. 89 : I.L.R. 11 Bom. 551 (P.C.).

[5] (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).

[6] (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.

[7] (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 151 (P.C.).

[8] Seventh edition, p. 70.

[9] (1956) 1 M.L.J. 5 (F.B.).

A noteworthy feature of the Act is the provision in section 11 that no person shall be entitled to deal with or dispose of the property of a Hindu minor on the ground of his or her being the *de facto* guardian of the minor. In Muslim law no doubt a *de facto* guardian was considered incompetent to alienate the property of a minor and the alienation was regarded as totally void. But in the case of Hindus, previously to the present Act, a *de facto* guardian was recognised as having power to bind by his acts the minor's estate provided such acts were to meet a need or for the benefit of the minor's estate. The same yardstick was applied to judge the validity of the acts of a *de facto* guardian as was used in the case of a *de jure* guardian. Whether the change made by the present Act in the position of a *de facto* guardian will prove salutary or is a change in the right direction is debatable.

The foregoing review shows that the Act is not entirely satisfying or satisfactory, that it is an imperfect and piecemeal legislation on the subject of guardianship and will probably give rise to more problems than it has solved.

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[1] (1955) Andh. W.R. 818 (F.B.).

[2] (1856) 6 M.I.A. 393 (P.C.).

THE LATE SRI N. CHANDRASEKHARA AIYAR.

Reference in the Supreme Court.

APRIL 1, 1957.—When the Full Court assembled, the Hon'ble Mr. Sudhi Ranjan Das, Chief Justice of India, on behalf of the Bench, and the Solicitor-General for India, on behalf of the Bar, made references to the late Nagapudi Chandrasekhara Aiyar, ex-Judge of the Supreme Court of India, in the following terms :—

HON'BLE MR. S. R. DAS, *Chief Justice.*

Mr. Solicitor-General,

It is with a heavy heart that I mentioned to you and the members of the Bar the passing away of Nagapudi Chandrasekhara Aiyar, who was an esteemed colleague and a very dear friend. The melacnholy news reached me yesterday evening.

Nagapudi Chandrasekhara Aiyar was born on January 25, 1888. He was educated at Conjeevaram, Tirupathi and Madras and was a student of the Christian College and the Madras Law College. During his College days he was a keen sportsman, interested chiefly in cricket. This interest in sport he kept up even after he became a District Judge. After a brilliant academic career, he was enrolled as a Vakil of the Madras High Court in 1910. He worked in the Chambers of Dr. C. P. Ramaswami Aiyar whom he used to refer to as his master and for whom he had very high regard. He picked up an extensive practice on the Original Side of the Madras High Court. In July, 1927, he became the City Civil Judge and in December of the same year he was appointed as a District and Sessions Judge. He was raised to the Madras High Court Bench in July, 1941 and worked there as a Judge until January 25, 1948. The State utilised his mature experience in different spheres. He was appointed as a Member of the All-India Industrial Tribunal (Bank Disputes). He was later appointed as a member of the Indo-Pakistan Boundary Disputes Tribunal. Shortly thereafter he was appointed as Judge of this Court and was sworn in on September 23, 1950. Immediately after his retirement from this Court on January 24, 1953, he was chosen as the Chairman of the Delimitation Commission. Towards the end of his term in this Court he fell ill very seriously. He responded to medical treatment and the devoted nursing of his good wife brought him round. That illness, however, had undermined, his otherwise robust health and had left him weak. But undaunted by his physical ailments and in a true spirit of service he moved about from place to place all over India and successfully completed the work of the Commission. Just at that time Chief Justice Mukherjea fell ill and on his advice Nagapudi Chandrasekhara Aiyar was called upon by the President to assist this Court as an *ad hoc* Judge. This burden he cheerfully accepted and efficiently discharged to the satisfaction of all concerned. Even after this he had to undertake, as Chairman, further work of delimitation consequent upon the reorganisation of the States.

Nagapudi Chandhrasekara Aiyar was well grounded in legal principles. To his legal acumen he added his deep insight into human nature and psychology and a robust commonsense. On all intricate legal problems presented before the Court he brought to bear a mental freshness, which often contributed to their solution. The judgments written and delivered by him, which will be found reported in the Law Reports, will bear testimony to his legal learning and human sympaties. In his behaviour towards the members of the Bar he was always kind and considerate. Towards his colleagues he was systematically courteous.

Nagapudi Chandrasekhara Aiyar's interest in life was not confined to law or within the cloistered compound of a Court of law. While he was a sound lawyer and a learned Judge, he was also a man of great erudition in Sanskrit and English literature. He was, on the one hand, the editor of the latest edition of Mayne's Hindu Law; he was, on the other hand, the author of "Anjaneya" which he had dedicated to his master and of Valmiki Ramayana. For those of us, who came into close contact with him his ready quotations from our ancient scriptures and literary works of our classical poets were indeed a matter of joy. The Convocation addresses delivered by him were thoughtful and incisive.

Nagapudi Chandrasekhara Aiyar above all was a warm-hearted man, a man of genial temperament and a very friendly person. His bubbling cheerfulness and refreshing sense of humour inevitably dispelled dullness and he had the kindly knack of putting everybody at ease. He was a lively conversationalist, full of sparkling humour, and cheerful *bonhomie*. Those of us, who had the privilege of coming close to him will always miss the glow and the warmth of his kind friendliness.

The passing away of an erstwhile esteemed colleague and a friend certainly brings to one's mind a sense of loss and sadness. We remember with gratitude the consideration, courtesy and kindness that we always received from him. We request you to convey to his companion in life our sense of admiration for the constant care and devoted attention which she daily bestowed on him and our heartfelt sympathy for her in her dark and dismal day of sorrow. We pray with her for the peace of his soul.

MR. C. K. DAPHTARY, *Solicitor-General for India.*

My Lord,

The news of the passing away of Shri Chandrasekhara Aiyar has come to most of us as an unexpected shock. After his miraculous and seemingly complete recovery from illness a few years ago, it was hoped that he would be spared for many years to come, to continue his distinguished services to the State. When he came to the Supreme Court Bench, he had behind him a record of work in the High Court and in other fields of public life and had won that admiration which is the just due of one who reaches the highest rung of the judicial hierarchy. When he left he had won also respect and confidence by his forthright and robust dealing with problems uncluttered by over-subtlety. He won too, affection by his hearty good-fellowship and kindness which embraced all alike, senior, junior and beginner. By his death, the law has lost a notable personality and the State a citizen of outstanding quality, who laboured in its service, and had death not snatched him away would have continued to render valuable service.

On behalf of the Bar and myself, I associate myself with the expression of regret and the tribute to Shri Chandrasekhara Aiyar's memory which your Lordship the Chief Justice has so feelingly expressed.

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THE MEASURE OF A SURETY'S LIABILITY

By

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A contract of guarantee is a contract *strictissimi juris*. Section 128 of the Indian Contract Act seems to be the measure of a surety's liability under a contract of guarantee. Section 128 runs as follows:—"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided in the contract". It can be said that section 128 lays down the measure of the surety's liability. Judicial decisions favour this view.

In *Shaik Sulaiman* v. *Shivzan Bhikaji*[1], it was observed that if an amount recoverable by a plaintiff from a defendant debtor is diminished in appeal, the surety's engagement, being one of indemnity would diminish in like proportion. So, if the sum recoverable became zero, owing to the decree being reversed, the surety's liability would also be reduced to nothing. In *Sami Iyer* v. *Ramaswami Chettiar*[2], Venkatasubbarao, J., observed as follows :—" The debt due by the judgment-debtor having become extinguished, are the plaintiffs entitled to proceed against the surety? They are not. To my mind, the question does not admit of any doubt. Cunningham and Shepherd in their 'Indian Contract Act' quote the following passage from Pothier when dealing with section 134 : " It results from the definition of a surety's engagement as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety, it being the nature of an accessory obligation that it cannot exist without its principal ". The learned commentators add " The rule may also be put upon the less technical ground that if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory because the consequence would be that the surety on being compelled to pay would immediately turn round on the debtor ". I find it impossible to hold that the creditor can proceed against the surety although the debt has been recovered ". In *Babu Rao* v. *Babu Manaklal*[3], Niyogi, J., laid down as follows : " When the creditor seeks to enforce the debt against the surety, the latter is legitimately entitled to ask 'is the principal debtor himself liable ? If not, he has committed no default and you cannot compel me to discharge an obligation which has no existence. If, on the other hand, I pay you, how can I recover it from the principal debtor whose liability, the debt itself having vanished, has ceased ? ' When the surety seeks his remedy against the principal debtor, he does it in respect of the same debt as the one owed by the principal debtor to the creditor. It is clear the debt must exist."

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1. (1887) I.L.R. 12 Bom. 71.
2. (1922) 44 M.L.J. 171.
3. I.L.R. (1939) Nag. 175.

Does section 128 of the Indian Contract Act lay down a principle of indemnity? Is a guarantee an indemnity? Does section 128 lay down the rule that if the surety cannot recover anything from the principal debtor, the creditor also cannot recover anything from the surety? Section 128 seems to be the controlling section in the law relating to a contract of guarantee as laid down in the Indian Contract Act. The effect of section 128 is far-reaching and many sided. The law on this matter is not free from difficulty. It is interesting to study the effect of section 128, when the liability of the principal debtor under a contract of guarantee is altered or affected by (1) the act of the parties, (2) the operation of law, (3) a defect in the primary contract.

(1) *By the act of the parties.*—Section 133 lays down the rule that the surety is discharged where the terms of the contract between the principal debtor and the creditor are varied by the creditor without the consent of the surety. *Pratap Singh* v. *Keshavlal*[4], is the leading authority on the point. In that case the guaranteed transaction was an advance of Rs. 1,25,000 by the creditor on the security of four properties. The creditor advanced Rs. 1,00,000 on the security of three properties only without surety's consent. It was held that the surety was discharged from liability as the obligation of the principal debtor was something different from the obligation guaranteed by the surety. Section 134 of the Indian Contract Act provides for the discharge of the surety from liability in the case where a contract is entered into between the creditor and the principal debtor by which the principal debtor is released or any act or omission is made by the creditor having the effect of discharging the surety. Section 135 provides for the discharge of the surety's liability when a contract is entered into between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor. Section 139 lays down that the surety is discharged if the creditor does any act which is inconsistent with the right of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired. Section 141 lays down that if the creditor loses or without the consent of the surety parts with a security, the surety is discharged to the extent of the value of the security. Therefore the principle laid down in section 128 has only a limited application where the liability of the principal debtor is affected by the act of the parties. The principle of section 128 applies in cases provided for in sections 134, 135 and 141. In other cases the surety is completely discharged irrespective of the liability of the principal debtor, obviously based on other principles of law and section 128 has no application.

In the Negotiable Instruments Act, 1881, we find that an acceptor of a bill of exchange is a principal debtor and the other parties are his sureties. So if the holder of an accepted bill of exchange enters into a contract with the acceptor whereby he is released from liability (within the meaning of section 134 of the Indian Contract Act) or the holder makes a composition with, or promises to give time to, or not to sue the acceptor (within the meaning of section 135, Contract Act) the other parties are all discharged. But if the holder at the time of conferring any such favour on the acceptor expressly reserves his right to charge the other parties, they will not be discharged.

(2) *By the operation of law.*—Rowlatt in his treatise on Principal and Surety observes as follows: 'A guarantee is not put an end to by reason of the debt becoming unenforceable against the principal by reason of matters happening subsequently unless it is due to an act or omission of the creditor contrary to his duty to the surety. Thus a surety is liable though the claim against the principal be barred by the statute of limitations or by reason of bankruptcy of the principal'. In Halsbury's Laws of England (Hailsham), 2nd Edition, Volume 16, it is stated: " Whatever expressly or imupliedly discharges the principal debtor from liability usually discharges the

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[4] (1934) 68 M.L.J. 339 : L.R. 62 I.A. 23 : I.L.R. 59 Bom. 180 (P.C.).

surety also by implication, as his position is thereby altered without his consent, notwithstanding that the alteration is accomplished by operation of law" Section 128 of the Indian Contract Act does not confine its operation only to the debts reduced by the act of the parties. Section 128 applies also to cases where the liability of the principal debtor is altered by operation of law. The effect of section 128 with reference to cases where the liability of the principal debtor is affected by the operation of law can be studied under three different headings :

(*a*) Operation of the Law of Limitation,
(*b*) Operation of the Insolvency Law,
(*c*) Operation of Special Statutes.

(*a*) *Operation of the Law of Limitation.*—Where by the operation of the Law of Limitation the creditor is unable to recover his debt from the principal debtor, the surety's liability is not discharged. Therefore section 128 has no application. In *Subramania Aiyar* v. *Gopala Aiyar*[5], Benson, C.J. and Krishnaswamy Aiyar, J., held that a debt the recovery of which is barred by limitation is not extinguished and the debtor is not, by reason of the bar of limitation discharged therefrom and that the omission of the creditor to sue the debtor within the period of limitation is not an act the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under sections 134 and 137 of the Indian Contract Act. In the case of *Mahant Singh* v. *U Ba Yi*[6], their Lordships of the Judicial Committee observed : "The solution is, in their Lordship's view, to be found in the wording of section 2 (*j*) itself. Not every unenforceable contract is declared void, but only those unenforceable by law and those words mean not enforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy would be avoided by section 2 (*g*), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by section 2 (*j*). A mere failure to sue within the time specified by the statute of limitation or an ability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void. Finally as their Lordships think, sections 134 and 139 are merely declaratory of what the law of England was and is. Section 139 only applies where the eventual remedy of the surety against the principal debtor is impaired."

(*b*) *Operation of the Insolvency Law.*—In the leading case of *Ex parte Jacobs*[7], it was held that where the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law and the drawer is not thereby discharged from his liability. The rule enunciated in this decision has been set forth very clearly in another case, In re *Fitzgeorge*[8], where Bigham, J., says : "I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that, because the principal debt is gone, therefore, the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by the operation of law. The principal debt will never be repaid, but in my opinion the obligation of the debtor to pay the interest under his guarantee remains." That the rule laid down in *Ex parte Jacobs*[7] applies to India, has been recognised by a Bench of the Madras High Court in the case of *Bombay Company Ltd.* v. *Official Assignee of Madras*[9]. The rule is embodied in the Insolvency Acts. Section 44 of the Provincial Insolvency Act which is similar to section 45 of the Presidency Towns Insolvency Act runs as follows: "An order of discharge shall not release any person who at the date of the presentation of petition, was a partner or co-trustee with the insolvent or was jointly bound or had made any joint contract with him or any person who was surety for him". Therefore section 128 has no application where due to the operation of Insolvency Law, the liability of the principal debtor is altered.

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[5] (1909) 20 M.L.J. 633.
[6] (1939) 2 M.L.J. 253: L.R. 66 I.A. 198 (P.C.).
[7] (1875) L.R. 10 Ch. App. C. 211,
[8] L.R. (1905) 1 K.B.D. 462.
[9] (1920) 40 M.L.J. 404.

(c) *Operation of a Special Statute.*—In *Subramaniam Chettiar* v. *Batcha Rowther*[10], Wadsworth and Patanjali Sastri, JJ., held that where the discharge of a principal debtor is brought about not by any voluntary act of the creditor but by the operation of a statute subsequently passed, the surety cannot claim discharge, *pro tanto* with the principal debtor. Section 128 of the Contract Act defines the obligation of the surety on the date of the contract of guarantee. When a new statutory provision has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected. This decision was overruled in *Subramania Chettiar* v. *Narayanaswami Gounder*[11], by a Full Bench of the Madras High Court. The decision was over the question whether a non-agriculturist surety woud be liable for the entire debt even though the principal debt was scaled down under the provisions of the Madras Agriculturists Relief Act. The Court observed: " Section 128 of the Indian Contract Act says that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by contract. It is a settled principal of law that the surety's liability is only accessory and secondary. Under the express provision of section 128 his liability is made only co-extensive with that of the principal debtor. That can only mean that his liability is no less or no more than that of the principal debtor. If the amount payable by the principal debtor is discharged in part, the surety's liability also is *pro tanto* reduced......A non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisons of the Madras Agriculturists Relief Act, but will be liable only to the extent of the scaled down debt due by the principal debtor". From the above it follows that section 128 of the Indian Contract Act comes to the aid of the surety in cases where the liability of the principal debtor is reduced.

(3) *By a defect in the primary contract.*—Where the liability of the principal debtor is affected by a defect in the contract between the principal debtor and creditor, whether section 128 of the Indian Contract Act is attracted with reference to the liability of the surety is a question of a complicated nature. An interesting question arises in the case of a principal debtor who is a minor. The creditor cannot enforce his rights against the minor. In such a case is the surety liable ? Or by virtue of section 128, is his liability reduced to zero? In India, the answer has to be found with reference to the provisions relating to a contract of guarantee in the Indian Contract Act. In English Law the matter seems to have settled down to a certain extent by the decision in *Coutts & Co.* v. *Brown Lecky,*[12] where two persons guaranteed a loan by way of overdraft advanced by a bank to an infant. The fact of infancy was known to all the parties. Oliver, J., after examining earlier decisions held that "as the obligation of the surety is an obligation necessary to that of a principal debtor, it follows that there should be a valid obligation of a principal debtor ; consequently if the principal debtor is not obliged neither is the surety, as there can be no accessory without a principal obligation." In the 21st Edition of Chitty on Contracts reference has been made to this decision and the general principal has been laid down as follows : "The general nature of a contract of guarantee is sufficiently simple. It is a collateral engagement, either by way of prsonal liability or by a charge on property or by both to answer for the debt, default or miscarriage of another as distinguished from an original and direct engagement for the partys own act It is therefore of the essence of this contract that there should be some one liable as principal ."

Turning to the Indian Law on the point the matter is not free from difficulty. The Indian Courts have transgressed the provisions in the Indian Contract Act and borrowed various principles from the English Common Law. The earliest reported decision on this point is *Kashiba* v. *Sripat Narshiv*[13]. In this case a minor girl entered into a bond. Her father also joined the bond and the terms were 'should she fail to pay, I will pay the above mentioned amount personally without pleading her excuse and take back this bond'. It was held in this case that the father was liable. Farran, J., observed as follows : " The case is perhaps still more clear if the promise of the infant to repay the money is void. In that case, the contract of the so-called surety is not a collateral but a principal contract. It is a conditional promise founded upon valuable consideration. It is like the case of a person who to appease the anger of a child, requests another to lend a guinea to the child to play with, and promises if the child loses or does not give back the coin, to make it good to the lender. The promise in such circumstances is clearly that of a principal and not of surety, and the situation is not altered by its being called a guarantee." In the Seventh Edition of Pollock and Mulla in the notes to section 128 of the Indian Contract Act, the following passage from the judgment of Farran, J., in *Kashiba* v. *Sripat*[12] is cited : " This section only explains the quantum of a surety's obligation when the terms of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former. And where the original agreement is void as in the case of minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so called surety is not a collateral, but a principal contract." The decision in *Kashiba's case*[13] has been taken as the authority for the proposition that the contract of guarantee is a collateral and independent contract and the surety will not be discharged from liability even though the promise of the principal debtor is void on the ground of his incapacity to contract.

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[10] (1941) 2 M.L.J. 751.

[11] (1950) 2 M.L.J. 674 (F.B.).

[12] L.R. (1947) 1 K.B. 104.

[13] (1894) I.L.R. 19 Bom. 697.

Recently the Madras High Court had the opportunity to consider this question. A different view was taken in the matter. In *Kelappan Nambiar* v. *Kunhi Raman*[14], their Lordships Rajagopalan and Rajagopala Iyengar, JJ., held that " it is the essence of the contract of suretyship that there should be someone liable as distinguished from an orginal and direct engagement for a party's own act. Hence the guarantor of an infant's loan where all the parties know the facts, cannot be sured". Their Lordships further observed : " It is to our mind clear that the law laid down in section 128 of the Indian Contract Act enacts the same rule. In the absence of special circumstances, like fraudulent representation or in the absence of other features from which a Court could infer the contract to be an indemnity as defined in section 124 of the Indian Contract Act, the liability of the surety is only ancillary, and can rest only on a valid obligation on the part of the party whose debt or obligation is guaranteed." Their Lordships relied upon the decision of Oliver, J., in *Coutts & Co* v. *Brown Lecky*[15], the passage in Chitty on " Contracts ", the observations in the Full Bench case in *Subramania Chettiar* v. *Narayanaswami Gounder*[16], and the principle laid down in section 128 of the Indian Contract Act.

It is submitted that in a case where the liability of the principal debtor is altered or affected by subsequent events after the coming into existence of the contract of guarantee, whether it is by the act of the parties or by operation of law, the principle laid down by section 128 of the Indian Contract Act has a valid application. Where the liability of the principal debtors is affected by a defect in the primary contract section 128 has no application whatsoever. The proper construction to be placed upon section 128 is that it means 'that the surety's liability will not be unduly extended and it comprises all transactions which naturally and reasonably are entered on the faith of the guarantee'. The illustration to section 128 makes this clear. The question whether the surety is liable under a contract of guarantee in a case where the principal debtor is a minor, is to be answered with reference to sections 126 and 127 of the Indian Contract Act. Section 126 defines a contract of guarantee. It is a well defined and self-contained section. Section 127 deals with the consideration that is requisite to support a contract of guarantee. Section 126 makes reference

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13. (1894) I.L.R. 19 Bom. 697.
14. (1956) 2 M.L.J. 544.
15. L.R. (1947) 1 K.B. 104.
16. (1950) 2 M.L.J. 674.

to a 'promise' and does not refer to a 'contract' or 'agreement'. The term promise is defined in section 2, clause (*b*) of the Indian Contract Act. Therefore if there is a promise of a third person in fact and if the performance of that promise is undertaken by the surety it is a valid contract of guarantee. It is immaterial who the third person is or whether he has contractual capacity. It need not be 'contract' or 'an agreement enforceble by law'. Similarly the liability undertaken by the surety need not be a contractual liability. Therefore if it is the liability of a minor, it does not affect the validity of the contract of guarantee. Again the word 'default' in section 126, need not be a default at law. Prior legal proceedings against the debtor are not necessary to charge the surety with liability. Therefore it is submitted that the liability of a surety will not be affected by the lack of contractual capacity on the part of principal debtor in the primary contract.

Both in *Coutts & Co* v. *Brown-Lecky*[17], and *Kelappan Nambiar* v. *Kunhiraman*[18], the Judges qualify their judgment and restrict it to the case where all the parties knew that the principal debtor was a minor. With all respect, it is submitted, that it should make no difference whether the parties know he is a minor or not. A minor is not estopped from pleading his minority (*Sadiq Ali Khan* v. *Jai Kishore*[19]). It therefore follows that the debtor can plead that the debt is void and that he is not liable. If so on the reasoning of Oliver, J., in *Coutts & Co.* v. *Brown-Lecky*[17], and their Lordships Rajagopalan and Rajagopala Iyengar, JJ., in *Kelappan Nambiar* v. *Kunhiraman*[18], the surety should be able to plead that he is not liable.

It follows from the above discussion that section 128 of the Indian Contract Act is an important section laying down a principle which has a far-reaching effect on the liability of the surety. Section 128 determining the measure of the surety's liability appears to be the balance in which his liability has to be adjusted with reference to the liability of the principal debtor. Section 128, obviously oversimplified a complicated principle of law. It is to be seen how far the effect of section 128 is going to be placed beyond doubt by future legislation, but now as it stands, the section is not free from complications.

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[17] L.R. (1947) 1 K.B. 104.

[18] (1956) 2 M.L.J. 544.

[19] (1928) 55 M.L.J. 88 (P.C.).

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WAS GANDHIJI A GREAT LAWYER ?

By

S. VARADARAJULU NAIDU, *District and Sessions Judge of Ramnad at Madurai.*

The question so posed is perplexing indeed, remembering that the Father of the Nation was not forensically as famous as, for example, Pandit Motilal Nehru or S. Srinivasa Iyengar ; nor did he make piles of money while at the Bar as, for example, Womeshchendra Banerji did even in the late nineteenth century at the Calcutta Bar. The genius of India usually appraises the high water mark of excellence in anything by that of ethical excellence. Gandhiji would not take up a false or a dubious cause. At Bombay, and more pronouncedly in South Africa he disliked to help litigants with such causes and would rather help them to compromise their causes.

Gandhiji in a way presents a difficulty to young aspirants at the Bar, whether to follow him or to follow the traditions of the English Bar, One of the bricks that had gone into the structure of the British jurisprudence is that it is the province of the Judge to judge and not for the lawyer to step into the place of the Judge The lawyer's duty is to advance the cause of his client, in the best manner possible forensically, but within the limits of the professional code. The professional code of the British pattern which modern India has made it its own, points that it is not for the lawyer to deny his services to a client with a bad or a dubious cause, while certainly he would be landing himself into the clutches of criminal law, if he should provide his client with weapons forged with falsehood to fight his adversary.

We have had in Sir P. S. Sivaswami Iyer, the example of a lawyer who would feel it to be his duty to cite a reported decision against himself. His example is even more perplexing.

The right guidance, however, to the young aspirant at law is to direct him to follow the traditions of the English Bar, rather than Gandhiji or Sir Sivaswami Iyer.

This way of resolving the problem, presented by Gandhiji and by Sir Sivaswami Iyer, should not, however, confuse our right appraisal of Gandhiji, the lawyer. The believer in the efficacy of Rama-Nama, the man who would spell the word "Rama" even when the assassin's bullet was crossing his body, cannot be expected to be false to the Indian genius, though he was a Barrister of the Lincoln's Inn. The ideal, which Gandhiji made it an article of action in his own life as a lawyer, is, however, a pointer to the young aspirant at law that while following the best traditions of the English Bar, he shall not be tempted to roam into the forbidden land of misconduct.

Ideally speaking, Gandhiji was a great lawyer.

Sri T. M. Krishnaswami Iyer.

Hon'ble C. A. Vaidyalingam,
Judge, Kerala High Court.

LAWYER'S NEWS.

The Madras Advocates' Association excelled itself in organising three notable functions in the month of April, 1957. We are referring to the felicitations to Sri T. M. Krishnaswami Iyer on his completion of 50 years at the bar, the unveiling of the portrait of the Hon'ble Mr. Justice K. Subba Rao, Chief Justice of Andhra Pradesh High Court, and the reception given to the Hon'ble Mr. Justice C. A. Vaidyalingam, Judge, Kerala High Court.

Sri T. M. Krishnaswami Ayyar : the lawyer saint of Madras completes 50 years at the Bar.—Felicitations were offered at a representative function held on 25th April, 1957 to Sri T. M. Krishnaswami Iyer, the President of the Madras Advocates' Association, on the completion of 50 years at the Bar. With Sir S. Varadchariar in the chair the function was attended by Sri M. Patanjali Sastriar, the Hon'ble Sri P. V. Rajamannar, Chief Justice, Madras and by many other distinguished persons. Among others, messages were received from the Hon'ble Justice Sri T. L. Venkatarama Ayyar, Hon'ble Justice Sri B. Jagannatha Dass and the Hon'ble Justice Sri P. Govinda Menon, Judges of the Supreme Court, who have known Sri Krishnaswami Iyer at the Bar.

Glowing tributes were paid to the lawyer-saint of Madras on his completing fifty years of steady and unbroken service at the shrine of Justice. Sir S. Vardachariar extolled his great services as a lawyer at the Bar and his services in cultural and religious fields. The Chief Justice of Madras, associating himself with the function, said that he was struck by the remarkable vigour of mind, body and outlook that Sri Krishnaswami Iyer still possessed, despite his age and a full and strenuous carreer at the bar. Sri K. Rajah Iyer, President of the State Bar Federation paid a tribute to Mr. Iyer's study of facts and mastery over cases. Sri V. C. Gopalaratnam referred in appreciative terms to Sri Krishnaswami Iyer's sociable qualities and his religious lectures and Bhajans instilling faith in God in the minds of the people. We wish to join in the chorus of richly deserved tributes paid to Sri T. M. Krishnaswami Iyer, the veteran member of the Bar, on this occasion. We also owe him a special debt of gratitute for his deep interest and able guidance in the successful conduct of our Journal.

Sri T. M. Krishnaswami Iyer has won many laurels in Courts. His vast experience and the fruits of his wisdom have always been placed at the disposal of his clients. Above all he has inspired large gatherings of men, women and children with his devotional songs. His purposeful life and career at the bar portrays a true lawyer : the highest product of civilisation, a master of the science of law and human experience, one who shuns display but loves justice and peace, one whose learning has made him realise the littleness of all human achievements. We wish him long years of health and happiness and invoke the Almighty to give him the strength and energy to continue his useful service to humanity at large.

The unveiling of the portrait of Hon'ble Sri K. Subba Rao, Chief Justice, High Court of the Andhra Pradesh.

The inspiring and attractive portrait Gallery of the Madras High Court has been enriched by the addition of an oil painting of the Hon'ble Justice Sri K. Subba Rao, Chief Justice of the High Court of Andhra Pradesh, on 22nd April, 1957. The Madras Advocates' Association is to be complimented on its thoughtful presentation of the nice portrait, which was accepted by the Hon'ble Chief Justice, Madras.

Sir M. Venkata Subba Rao, himself a great lawyer and a renowned Judge of the Madras High Court, unveiled the portrait. Many there must have been who felt happy to see him once again in their midst after a long time. Sir M. Venkata Subba Rao described Mr. Justice Subba Rao as a fair and persuasive lawyer and an independent and sympathetic Judge. He paid tributes to Sri Venkataramana Rao, whose illustrious family has contributed two Chief Justices, the present Chief Justices of the Madras and Andhra High Courts.

The Hon'ble Mr. Subba Rao who was a member of the Madras Bar and later a Judge of the Madras High Court is still warmly remembered by every one in Madras. Those who had the privilege of moving with him when he was at bar, were struck by his high sense of ethics. He was never known, to pervert the law nor falsify facts to defeat an adversary. With a disarming smile, which has endeared him to every one who came into contact with him, he knew to bear criticism without irritation and calumny without retaliation. These qualities have stood him in good stead in his great and admirable work as a Judge. With an inborn sense of fidelity to the law and the facts of a case his judgments have been characterised by their straight approach, clear analysis and sound logic. As a man he hates vice and shuns glory and neither love of friends nor fear of foes would make him swerve from the path of duty.

Hon'ble Mr. Justice C. A. Vaidyalingam, Judge, Kerala High Court, entertained.

The Madras Advocates' Association, the Bar Council and the Madras State Bar Federation joined together in throwing open a large party on 26th April, 1957 to entertain the Honble Mr Justice C. A. Vaidyalingam, Judge, Kerala High Court.

The pleasant function on the spacious lawns of the Madras High Court was attended by the Chief Justices and several Judges of the Madras High Court, High Court of Andhra Pradesh and among others by Sir S. Varadachariar, Sri M. Patanjali Sastriar, Sri Venkataramana Rao and Sri K. P. Lakshmana Rao.

Son of a distinguished Judge of the Madras High Court, Sir C. V. Ananthakrishna Iyer, Sri Vaidylingam was till recently a member of the Madras Bar. A brilliant student and a successful lawyer it was almost axiomatic that he would adorn the Bench earlier or later in his career. Born in a family with a traditional reputation he was an apprentice under Sri Venkataramana Rao, and was a junior in the Chambers of Sri P. V. Rajamannar and Sri K. Subba Rao. In a short period he built up a lucrative practice at the bar and had occasions to conduct several important cases before the High Court. As Government Pleader he was in charge of several notable cases and he acted as *amicus curiae* in the recent Justice Bose Commission Enquiry in the Ariyalur Train Disaster. He took interest in the Bar Council and was a member of the Bar Council for over two successive terms. Pious and charitable by disposition he has helped many institutions for public good. With his bright and kindly face, quiet and soft manners he was never known to wound anybody's feelings.

Thanking the gathering for the felicitations Sri Vaidyalingam said he was overwhelmed by the affection and kindness showered on him. He concluded by saying that it would be his endeavour to keep in view the high traditions built up by eminent Judges in Travancore and Cochin and would discharge his duties as well as he could. With his equipment and experience we are sure the Wig of a Judge will sit lightly on his head. We wish him all success in his new office.

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MARCH OF LAW IN 1956.

The year just ended is a notable one. It has witnessed the enactment of various measures of far-reaching importance like the Indian Companies Act, the Hindu Succession Act, the States Reorganisation Act, etc. The repercussions of these measures on litigation and the work of the Courts cannot yet be assessed. The year has been one of transition both in the matter of national planning as well as in regard to social reorientation. During the course of the year 43 decisions of the Supreme Court have been reported in the columns of this Journal besides the judgments of the High Court marking a continuous stream of steady development. An attempt is here made to review the more important of such decisions.

CONSTITUTIONAL LAW.

In *State of Madras* v. *Rajagopalan*[1] the Supreme Court points out that, apart from the fact that the Secretary of State and his services disappeared as from 15th August, 1947, section 10 (2) of the Indian Independence Act and Article 7 (1) of the Indian (Provisional Constitution) Order proceeded on a clear and unequivocal recognition of the validity of the various Special Orders and the individual arrangements made amount to an implicit statutory recognition of the principle of automatic termination of the services brought about by the political change, and therefore the service of a member of the Indian Civil Service came to an automatic termination on the emergence of the Indian Dominion. In *B. N. Dakras* v. *State of Madhya Pradesh*[2], the Supreme Court makes it clear that Article 13 (1) by reason of its language cannot be read as having obliterated the entire obligation of the inconsistent law or having wiped it out altogether from the statute-book, that such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution and that the law continued in force even after the commencement of the Constitution with respect to persons who were not citizens and could not claim the fundamental rights. This view is reiterated in *Purushottam Govindji* v. *B. M. Desai*[3], where the Supreme Court observes that the effect of Article 13 (1) is that the impugned law could not stand in the way of the enjoyment of fundamental rights and that the law was not dead either. The decision further lays down that the grouping of income-tax defaulters into separate categories or classes State-wise is certainly a territorial classification based on intelligible differentia, and the subjection for the purposes of recovery of the certified demand of each of such classes of defaulters to the same coercive process devised by their own State on a consideration of the local needs for the recovery of their own public demand cannot be regarded as bereft of a reasonable nexus or correlation between the basis of classification and the object sought to be achieved by the Indian Income-tax Act any more than it can be so regarded with respect to the state laws, and that section 46 (2) of the Income-tax Act is not in any way repugnant to Article 14 of the Constitution. In *Motajog Dobey* v. *H. C. Bhari*[1], it is held that Article 14 does not render section 197, Criminal Procedure Code, *ultra vires* as the discrimination is based upon a rational classification, namely, that public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. *Krishna Iyer* v. *State of Madras*[2] states that under Article 14, the classification sought to be made should have a just and reasonable relation to the objects of the impugned Act, which, in the case of the Madras Sales-tax Act was to tax the turnover, and therefore the situs of the sales has no rational connection to the levy of a tax at a higher rate. *Sheikh Muhammad Hussain*, In re[3] decides that it cannot be held that any statement taken by the police or anything done by the police in the course of investigation which is subsequently produced before the Court as evidence is hit by Article 20 (3) and that a thumb-impression taken by the police in the course of investigation from the accused which is produced in Court later at the trial does not amount to testimonial compulsion. *Seetharaman*, In re[4] holds that Article 22 (4) only applies to a case of detention by an executive authority and not by a judicial Tribunal after a full trial and hence the provisions of section 123, Criminal Procedure Code, providing for detention for failure to give security ordered after a full trial by the Court cannot be held to be void as being repugnant to Article 22 (4). In *Haripada De* v. *State of West Bengal*[5], the Supreme Court lays down that where the question involved was one of fact the High Court has no jurisdiction to grant a certificate under Article 134 (1) (*c*) merely because it feels that there has been no full and fair trial vouchsafed to the accused, that the proper procedure will be to ask the parties to approach the Supreme Court invoking its special jurisdiction under Article 136 (1), and that under that Article if there has been a gross miscarriage of justice or a departure from legal procedure such as vitiates the whole trial or if even the findings of fact were such as were shocking to the judicial conscience the Supreme Court will intervene. In *Aher Raja Khima* v. *State of Saurashtra*[6], the Supreme Court points out that when the High Court considers the evidence and comes to its own conclusion the findings recorded by it are not, even when they result in a reversal of the order of acquittal, open to interference in special appeal under Article 136. *Sivaramakrishnan* v. *Arumugha Mudaliar*[7], states that though a writ of *quo warranto* is not a writ of right, still if the validity of an appointment or a claim to an office by a person is challenged by an applicant for a writ and the Court is satisfied that the petition has been filed without improper motives and without delay, it has the right to investigate the matter and decide on the validity of the appointment notwithstanding that the petitioner is not a rival applicant to that office and in that sense does not have a personal interest in the issue of the writ. *Venkatasubba Reddiar* v. *Registrar of Co-operative Societies*[8], states that where an officer entrusted with the discharge of *quasi*-judicial functions fails and neglects to do his duty and omits to apply his mind to the matters before him and acts contrary to the rules and bye-laws the High Court will interfere by issuing a writ to set right such matters which are without jurisdiction, and that the powers conferred on the High Court by Article 226 cannot be taken away or whittled down by the Legislature. *Marappa Goundar* v. *Central Road Traffic Board*[9], lays down that in an application for a writ under Article 226, the Court should be reluctant to interfere with a finding of fact, unless the circumstances gathered from the materials placed before it conclusively establish that no reasonably-minded Tribunal could have reached that conclusion. In *Raman & Raman Ltd.* v. *Government of Madras*[10], the Supreme Court points out that where the satisfaction of the State Government on a matter would be an expression of its opinion and not the determination of a fact upon which its jurisdiction to exercise the powers under a statute—Section 64-A of the Madras Motor Vehicles Act—is founded it would not be open to a Court exercising the power of *certiorari* to intervene merely because it might be of the opinion that the view taken by the State Government was erroneous. *Muhammad Ibrahim* v. *Deputy Commercial. Tax Officer*[1], states that neither the provisions of Order 1, rule 8, Civil Procedure Code, seeking to obviate the inconveniences arising out of a multiplicity of parties nor its principle can be extended to writ petitions and the fact that the relief prayed for by the several petitioners is grounded on a common objection does not also afford any basis for joint writ petition by several petitioners aggrieved by similar orders. *Thiruvaduthurai Mutt* v. *Estates Abolition Tribunal*[2] takes the view that there is no authority for holding that under no circumstances where the remedy of a suit is available could the High Court exercise its jurisdiction under Article 226, though it is very relevant factor to be taken into consideration in exercising the jurisdiction in a given case. In *Mohanlal Hargovind Das* v. *State of Madhya Pradesh*[3], the Supreme Court points out that where the facts showed that the concerned transactions were not internal sales but were transactions in the course of inter-State trade or commerce the ban of Article 286 (2) will apply and the State Government cannot levy a tax on such transactions. In *India Coffee Board* v. *State of Madras*[4], it is held that in order to constitute inter-State trade or commerce, the contracts in respect of the activities of buying and selling should contemplate or necessarily involve the movement of goods in inter-State commerce, that a mere making of contracts between persons in different States does not of itself constitute inter-State commerce, and that the test is to see whether inter-State transportation of goods is necessarily involved in their execution. Similarly in *State of Madras* v. *Louis Dreyfus & Co.*[5], it has been held that the test for determining whether a sale took place within the Madras State so as to entitle the State to levy tax or not is whether under the contract between the buyer and the seller the property in the goods did or did not pass within the State. *Karuppa Udayar* v. *State of Madras.*[6], decides that a village karnam not governed by the Madras Hereditary Village Offices Act, 1869, is a civil servant who holds the post under the State within the meaning of Article 311 (1), that before he can be dismissed the requirements of Article 311 (2) must be satisfied, that the stage at which the opportunity for which Article 311 (2) provides should be given is after the conclusion of the inquiry and the recording of the findings and before the action proposed to be taken is to follow as a result of the proceedings, and that the fact that the civil servant was given an opportunity to defend himself against the charges in the inquiry following the formulation of the charges or at any previous stage would not satisfy the requirements of the Article. *Varadarajulu Chettiar* v. *State of Madras*[7] also lays down the same principle and states that if the opportunity is so given to the officer, the representations the officer may make should also be considered by the Government. It is further stated that under Article 320 (3) (*c*) the Public Services Commission concerned has to be consulted before the Government decides on the punishment to be inflicted on the officer, but this does not imply that the concerned officer should be given a further opportunity after the Services Commission has been consulted, and there is no real conflict between the requirements of Article 311 (2) and Article 320 (3). *Kuppuswami* v. *State of Madras*[8] takes the view that there is a difference between the two forms of punishment inflicted on a civil servant, namely, compulsory retirement and removal from service, though the effect may be the same in both cases, and that the former is not within the scope of the protection afforded by Article 311.

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[1] (1956) 1 M.L.J. (S.C.) 12.

[2] (1956) 1 M.L.J. (S.C.) 37.

[3] (1956) 1 M.L.J. (S.C.) 51.

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[1] (1956) 1 M.L.J. (S.C.) 79.
[2] (1956) 2 M.L.J 179.
[3] (1956) 2 M.L.J. 427.
[4] (1956) 1 M.L.J. 232
[5] (1956) 2 M.L.J. (S.C.) 65.
[6] (1956) 1 M.L.J. (S.C.) 135.
[7] (1956) 2 M.L.J. 460.
[8] (1956) 1 M.L.J. 284.
[9] (1956) 1 M.L.J. 324.
[10] (1956) 1 M.L.J. (S.C.) 169.

CONTRACTS.

Thathaiah v. *Union of India*[9], points out that where there is an enforceable concluded contract any clause therein providing that it is open to one of the parties at any time to say that the contract is not enforceable is invalid as it has the effect of actually or possibly destroying the contract altogether at the whim and fancy of one of the parties, but that it would be quite a different thing where the clause

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1. (1956) 2 M.L.J. 23.
2. (1956) 1 M.L.J. 382.
3. (1956) 1 M.L.J. (S.C) 5.
4. (1956) 1 M L.J. 487.
5. (1956) 2 M.L.J. 324.
6. (1956) 2 M.L.J. 15.
7. (1956) 2 M.L.J. 145.
8. (1956) 2 M.L.J 352.
9. (1956) 2 M.L.J. 584.

is only in the nature of a condition or qualification without destroying the contract, and that in cases of continuing contracts it may be open to the parties to provide that it can be determined by one of the parties upon certain terms. *Ramaswami Chettiar* v. *Jeevaratnammal*[1], states that it is a general principle of law that one simple executory contract does not extinguish another for which it is substituted, that negotiable securities form no exception to the rule, and that where a plaintiff deposits money with a banker and takes a promissory note for the money due under the deposit and also becomes a mortgagee under an equitable mortgage, there is no overt act from which it can be conclusively held that the plaintiff has waived the legal rights enuring in her favour because of the relationship of depositor and depositee. In *Govindaraj* v. *Kandaswami Goundar*[2], it is held that in considering the effect of a statutory prohibition on contracts it is always necessary to decide whether the penalty imposed for breach of the statute is meant as compenstion to the aggrieved person or as penal sanction, that in the former case the statute in effect permits the contract on payment of the penalty thereby making it expensive and in the latter case it forbids the contract *in toto*, that the circumstance that there is no specific provision in the Central Excise and Salt Act, 1944, prohibiting the formation of partnerships by the licensees and the primary purpose of the enactment is fiscal and designed for the security of revenue would not mean that the imposition of penalties should not be read as rendering the contracts illegal, and therefore the formation of a partnership by a licensee without reporting it within the time limited and having the license amended under Rule 178 of the Central Excise Rules, 1944, thereby attracting the penalties mentioned in the Act would *prima facie* be a contravention of the Act and the rules and such a partnership would be one prohibited by law within the meaning of section 23 of the Indian Contract Act so as to preclude any action between the partners for accounts of the partnership and for a share of profits. In *Adiraja Ariga* v. *Beeranna Rai*[3], it is made clear that the term " debt " in section 25 (3) of the Contract Act does not necessarily mean only the debt which the person agreeing to pay must have been personally liable for or a debt for which he may be proceeded against in respect of his property, but it means an obligation in the sense of action being maintainable against such person in respect of property in his hands, and the expression " person charged with " in the section does not refer only to the person initially liable for the debt but will also include third parties who have undertaken the liability though not personally but by reason of their owning the properties of the original debtor. *Kelappan Nambiar* v. *Kunhiraman*[4] states that in a contract of indemnity non-liability of the principal debtor does not alter the obligation undertaken by the indemnifier which is primary, that in several cases it is the possibility of the non-liability of the principal debtor that constitutes the occasion for the contract of indemnity, that a surety's obligation stands on a different footing his obligation being only ancillary ordinarily resting on a valid obligation on the part of the party whose debt or obligation is guaranteed, that it is of the essence of the contract of suretyship that there should be some one liable as principal as distinguished from an original and direct engagement for a party's own act, and hence the guarantor of an infant's loan where all the parties know the facts cannot be sued.

SPECIFICE RELIEF.

In *Manicka Goundan* v. *Elumalai Goundan*[5], it is pointed out that in the case of an agreement to sell it cannot be said that the contract has been fully performed till there is a properly executed document which is also registered, that though the purchaser can resort to proceedings under the Registration Act and the special statutory remedy under section 77 of the Act to obtain registration, if for any reason it becomes impossible to obtain registration after resort to such proceedings under the Act, the vendee is entitled to bring a suit for the specific performance of the agreement to sell in his favour, but being an equitable remedy a Court is not bound to grant specific performance in every case in which an agreement has not been carried out in its entirety. *Nagammal* v. *Agoramurthi*[1], holds that the discretion of the Courts in granting declaratory decrees though wide should be exercised in accordance with sound judicial principles, that in the application of section 42 of the Specific Relief Act to any declaratory suit it is not a question of the Court having jurisdiction to grant the declaration but the Court's having discretion in the matter, and stress is not to be laid so much on the question of its maintainability as on that of the propriety and utility of granting relief by way of declaration.

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[1] (1956) 2 M.L.J. 508.
[2] (1956) 2 M.L.J. 578.
[3] (1956) 2 M.L.J. 218.
[4] (1956) 2 M.L.J. 544.
[5] (1956) 2 M.L.J. 536.

COMPANY LAW.

Public Prosecutor v. *Kaithan*[2], points out that the provision in section 91-B of the Companies Act preventing a director directly or indirectly concerned or who is interested in a contract or arrangement entered into by the company from voting on resolutions relating to such matters is designed to prevent the making of secret profit by them, that the " interest " referred to is one involving a conflict between interest and duty and that the 'contract or arrangement' referred to and hit at by the section is one where there is conflict between interest and duty'. *Ramanathan Chettiar* v. "*Dinasari*" *Ltd.*[3], states that while under section 109 (*e*) a mortgage or charge on any movable property of the company except stock-in-trade would have to be registered as required under that section, a pledge of movable property need not be registered. In *Rajahmundry Electric Supply Corporation* v. *Nageswara Rao*[4], the Supreme Court holds that where the requisite number of persons consent in writing to the presentation of a petition under section 153-C of the Indian Companies Act, the withdrawal of consent by some of them cannot affect either the rights of the applicant to proceed with the application or the jurisdiction of the Court to dispose of it on its own merit, that where the facts proved do not make out a case for winding up under section 162 no order could be passed under section 153-C, that the words "just and equitable" in section 162 (*vi*) are not to be read as *ejusdem generis* with the matters mentioned in the earlier clauses, and that the appointment of administrators under section 153-C cannot be attacked on the ground that it is an interference with the internal management and affairs of the company. *Pudukkotai Ceramics* v. *Sethu*[5] lays down that the right of a liquidator in the winding up of a company as against a contributory being a statutory right created by the Companies Act and not a contractual one between the company and the shareholder, where a company goes into liquidation pending an appeal by it from a decree dismissing its suit for unpaid share money due by a shareholder who had defaulted to pay it after calls, the cause of action on which the suit was based does not survive to the liquidator so as to enable him to come on record as a legal representative of the company and prosecute the appeal filed by the erstwhile company. In *Manilal Akhaney* v. *State of Bombay*[6], the Supreme Court takes the view that there is nothing in section 179 which can be construed as restricting the powers of the Court to take cognisance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the Criminal Courts to bring an offender to justice, that section 179 is an enabling provision to enable the liquidator to do certain things with the sanction of the Court and does not control the general law of the land. *D. D. Italia & J. D. Italia* v. *Free Press Journal*[7], makes it clear that section 229 of the Companies Act must be read subject to the provisions of section 230 and inasmuch as the latter section makes express provision in respect of all categories or heads of claim dealt with in section 49 of the Presidency Towns Insolvency Act section 229 cannot be construed as justifying resort to section 49 of the Insolvency Act in proceedings in the winding up of a company in respect of rent due to a landlord from the company which is being wound up.

NEGOTIABLE INSTRUMENTS.

Hajee Mohamed Haneef Sahib & Co. v. *Abu Bucker*[8], points out that the mere fact that a post-dated cheque is endorsed over by the original payee before the actual

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1. (1956) 1 M.L.J. 465.
2. (1956) 2 M.L.J. 590.
3. 1956) 1 M.L.J. 328.
4. 1956) 1 M.L.J. (S.C.) 95.
5. (1956) 1 M.L.J. 486.
6. (1956) 2 M.L.J. (S.C.) 49.
7. (1956) 1 M.L.J. 463.
8. (1956) 1 M.L.J. 471.

date for payment will not give rise to the presumption that the endorsee of such a cheque has notice of the circumstances in which the cheque came into existence and that therefore he is not a holder in due course, that a post-dated cheque is as much negotiable as a cheque for which payment is due immediately on presentation, and there is no authority for holding that a person in whose favour such a cheque is endorsed before the date of payment is not a holder in due course or that such an assignment or endorsement is not enforceable at the instance of the assignee or endorsee.

PROPERTY LAW.

Ramanatha Sastrigal v. *Alagappa Chettiar*[1], decides that where there were no identifying witnesses before the Sub-Registrar registering a mortgage deed at the time of the registration thereof, the endorsement of the Sub-Registrar being that the executant was known to him personally and therefore he dispensed with the attestation of identifying witnesses and registered the document, the signature of the Sub-Registrar affixed to the registration endorsement does not amount to attestation within the meaning of sections 3 and 59 of the Transfer of Property Act and the Sub-Registrar is not an attesting witness for proving the mortgage under section 68 of the Evidence Act. The decision further holds that although a creditor suing to avoid a transfer under section 53 must bring the suit on behalf of the general body of creditors, the creditor is not debarred from raising a plea that the transfer is fraudulent by way of defence to a suit brought on the basis of the document of transfer. *Karthikeya Mudaliar* v. *Singaram Pillai*[2], lays down that the defence of part-performance under section 53-A is available to a person who has an agreement of lease in his favour though no lease deed has been executed and registered, that the section does not require that the agreement in writing should be in any form, that what is required is that there must be proof of the agreement in writing and evidence of its contents should be available from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and that where the written agreement is not produced by the party in custody of it oral evidence of the terms can be let in to prove the agreement. In *Ananda Behera* v. *State of Orissa*[3], the Supreme Court points out that the right to catch and carry away fish in specific sections of a lake is a profit *a prendre* which in England is regarded as an interest in land and in India as a benefit that arises out of land and as such is immovable property, and that where it was purchased for a price that was paid it required writing and registration because of section 54, Transfer of Property Act. *Kulathu Iyer* v. *Manickavasagam Pillai*[4], states that a question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase has to be decided on the facts of each case and that it is not possible to lay down an exhaustive list of factors that could apply to all cases. *B. A. Khan v. Nawaz Khan*[5], rules that in such cases the attendant circumstances like the existence of the relationship of debtor and creditor between the parties at the date of the suit transaction, the absence of a separate document providing for reconveyance, etc., will be relevant factors. *Ramachandrayya* v. *Lakshminarayana Rao*[6], holds that where in a deed of ostensible sale there is a condition that on the vendor paying the vendee the amount of sale price by a certain date the vendee should transfer the property back to the vendor and the condition as to repurchase is embodied in the document itself the document cannot be construed otherwise than as a mortgage by conditional sale and there is no warrant for the proposition that a person who wants a document to be treated as a mortgage by conditional sale should show that he was the mortgagor, that there was a mortgage pre-existing, a mortgaged property, a mortgage gage debt, etc. In *Ananthayya Holla* v. *Thimmaju Hengsu*[7], it is pointed out that the exception to the rule against partial redemption in section 60 would not apply, firstly, where there is only one mortgagor owning the entirety of the mortgage security and the mortgagee acquires a part of the security, secondly, where the mortgagee

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1. (1956) 2 M.L.J. 157.
2. (1956) 2 M.L.J. 515.
3. (1956) 2 M.L.J. (S.C.) 69.
4. (1956) 1 M.L.J. 385.
5. (1956) 1 M.L.J. 388.
6. (1956) 2 M.L.J. 565.
7. (1956) 1 M.L.J. 213.

acquires the share of a mortgagor in execution of a decree on a prior mortgage, and thirdly, where a mortgagee voluntarily releases from the suit a portion of the mortgaged property and acquires the same subsequently. *Venkitasubramania Ayyar* v. *Vadaserri Karnavan*[1], makes it clear that whatever might have been the state of the law prior to the amendment of section 61 in 1929 the section as it stands does not compel a mortgagor to redeem all the mortgages on one and the same property at the same time and that even if there is a mortgage with possession and a lease back of the mortgaged properties to the mortgagor and a charge is created on the equity of redemption for arrears of rent still the two transactions cannot be treated as one and the same compelling the mortgagee to redeem the same as such. It is also made clear that when a mortgagee brings a suit for sale of the mortgaged properties he has to claim all the amounts under separate mortgages but that the same principle cannot be applied when a mortgagor brings a suit for redemption. *Mohanraj Sowcar* v. *Manicka Goundan*[2], points out that the object of section 67-A is to extend the doctrine enacted in section 61 as the right of redemption and foreclosure are co-extensive as it is, that the section would apply to all cases where the mortgages relate to the same property or different properties of the mortgagor, that the provisions of section 67-A are mandatory, and that though no doubt it is the primary duty of the mortgagee to comply with such provisions, still in view of the fact that no provision is made as to the penalty for non-compliance, if due to the failure of the mortgagor to take the objection at the proper time the mortgagee proceeded on the apparent belief that the objection had been waived, the mortgagor cannot urge that a subsequent suit filed by the mortgagee on the second mortgage should be dismissed *in limine*. The decision contains the suggestion that section 67-A should be suitably amended inasmuch as the extension of the principle of consolidation of mortgages by the mortgagee when they relate to the same property to cases of mortgages over different properties also in order to bring it into line with section 61 does not appear to be necessary or justifiable. In *Saraswathi Bai* v. *Varadarajulu Naidu*[3], it is held that the powers conferred on a mortgagee for private sale without the intervention of the Court under section 69 and for the appointment of a receiver under section 69-A are concurrent rights, that neither section controls the other, and that the existence of a receiver under section 69-A is no impediment to the exercise by the mortgagee of the concurrent power of sale out of Court. *Krishnammal* v. *Krishna*[4], rules that a receiver appointed under section 69-A is a special receiver appointed for a particular purpose and that he has not got the status or the powers of a receiver appointed under Order 40, rule 1, Civil Procedure Code and so could not sell the mortgaged property. *Thayammal* v. *Adimoolam Servai*[5], lays down that only a person having an interest in the property subject to the mortgage has the right to redeem under section 91 (*a*), that the interest should be a present and subsisting interest in the property and not a mere contingent interest and that it is not needed that he should also be entitled to immediate right to possession and enjoyment. In *Ayyan Ammal* v. *Vellaiyammal*[6], it is pointed out that section 95 as amended in 1929 is not retrospective and does not provide for retrospective effect being given to the statutory right of subrogation conferred on a redeeming co-mortgagor by section 92. *Ranganathan* v. *Calcutta Tramways Ltd.*[7], holds that it follows implicitly from section 119 that if a party to an exchange has failed to obtain possession of the property he was entitled to receive in exchange to his, he is entitled in the alternative to recover compensation or damages, or sue for specific performance or can also claim the return of the goods delivered by him if they are in the hands of the other party or his legal representatives or transferees without consideration.

INSOLVENCY LAW.

In *'Ariya Vaisya Bank* v. *Nagaswamy Chettiar*[8], it is held that the proviso added to section 9 (1) (*c*) of the Provincial Insolvency Act by the Amending Act III of

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1. (1956) 1 M.L.J. 355.
2. (1956) 2 M.L.J. 77.
3. (1956) 1 M.L.J. 223.
4. (1956) 2 M.L.J. 30.
5. (1956) 1 M.L.J. 75.
6. (1956) 1 M.L.J. 255.
7. (1956) 1 M.L.J. 335.
8. (1956) 1 M.L.J. 380.

1950 giving an extended period for filing an insolvency petition in cases where the period of three months fixed by the statute expires when the Court is closed is neither made retrospective nor applicable to pending proceedings. *Pethi Reddi* v. *Venkata Reddy*[1], states that the effect of section 28-A is that in cases of Hindu joint family the power of the father to sell the son's share in the joint family property for debts incurred by him which are neither illegal nor immoral will vest in the official receiver when the father is adjudged insolvent, that the word "decision" in the proviso is synonymous with decree and hence the mere declaration of the rights of parties by a preliminary decree in a suit for partition will not amount to a final decision within the meaning of the proviso. *Janabai Ammal* v. *Narasimhalu Naidu*[2], indicates that what is saved by section 37 are sales and dispositions of property and payments duly made and acts done by the Court or receiver, that such acts must be acts done by the Court or receiver having relation to the sales and dispositions of property and payments duly made, and that such acts could not include the act of ordering the setting aside of an alienation which is restored to its former state on the annulment of the adjudication. *Subramania Pillai* v. *Sankara Kulathu Iyer*[3], points out that though notice under section 41 is peremptory, omission to give notice does not invalidate the discharge order, that section 44 protects the insolvent and not the assets in the hands of the official receiver, that so far as debts are proved up to the date of discharge are concerned they are not discharged under section 44 (2) but only cease to be provable debts and become proved claims before the Court administering the estate, but that any proceeding *de hors* the insolvency jurisdiction in respect of a debt provable in insolvency released by the order of discharge is not maintainable even though the insolvent makes a subsequent promise to pay the debt from which he was discharged.

ESTATES LAND ACT.

In *Govindaswamy Naidu* v. *T. P. Devasthanam*[4], it is pointed out that even in the case of a whole inam village becoming an estate under Madras Act XVIII of 1936 there can be private lands, that domain or home-farm land need not necessarily be situated in and around the residence of a zemindar or inamdar, that the touchstone of such land is direct cultivation, and that the true test in determining the character of land as private land is to see whether the landholder intended to exercise proprietary right over the land as and when he pleased although he might have let it out to tenants from time to time. *Sheikh Davood* v. *Prathasinha*[5], states that in fixing rent in a suit under section 77 it would be open to the Court to go behind the terms of the contract between the parties as per the patta and muchilika entered into between them, that the only effect of there being a patta in force by virtue of section 52 (3) is that except in the special cases falling under sections 25, 30, 42 and 45 the rent mentioned in the patta will under sections 27 and 28 be presumed to be the proper rent until the contrary is shown, and that the landholder without tendering or getting decreed a fresh patta can show to the Court in which the suit for rent is filed that he is legally entitled to a different amount from what is mentioned in the old patta. *Thiruvaduthurai Mutt* v. *Estates Abolition Tribunal*[6], decides that three grants of five isolated hamlets in rain-fed areas with wet and dry lands and isolated wet blocks in scattered places in four villages could not constitute an estate as defined in section 3 (2) (*d*) of the Estates Land Act and that the fact that under the Madras Estates (Abolition and Conversion into Ryotwari) Act the party aggrieved by an order of the Estates Abolition Tribunal has a remedy open to him by way of a suit does not preclude the High Court from interfering with the order in the exercise of its jurisdiction under Article 226 of the Constitution. *Pattabhirama Reddi* v. *Govinda Pillai*[7], holds that a grant implies the transference of a freehold right and the concept of a grant as a gift or benediction cannot be reconciled with a bilateral transaction like an indenture of lease under which covenants are entered into by both parties, and the fact that the rent was either nominal or

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1. (1956) 1 M.L.J. 576.
2. (1956) 1 M.L.J. 519.
3. (1956) 1 M.L.J. 52.
4. (1956) 2 M.L.J. 260.
5. (1956) 1 M.L.J. 316.
6. (1956) 1 M.L.J. 382.
7. (1956) 1 M.L.J. 82.

non-existent does not really bear on the nature of the transaction. In *State of Madras* v. *Srinivasa Iyengar*[1], the Supreme Court points out that when a post-settlement dharmilla inam in an estate does not relate to the entire village but only to a fraction of it, it retains its character as part of the estate in the hands of the inamdar and when the estate is notified under section 1 (4) of the Madras Estates Abolition Act the inam will vest in the State under section 3 (*b*) of the Act and will not be protected by section 20. *Saraswathi Bai* v. *Estates Abolition Tribunal*[2], lays down that the right of a landholder to the issue of a ryotwari patta in his favour in respect of a quondam estate under the Estates Abolition Act is to be determined in accordance with the provisions of section 12 (*a*) and (*b*) (iii), and in deciding the question lands comprehensively characterised as communal porambokes referred to in section 3 (16) (*b*) and 3 (16) (*a*) of the Estates Land Act are to be retained for the common use of the villagers. *Srinivasa Rao* v. *State of Madras*[3], lays down that under section 12 (*c*) of the Estates Abolition Act the right of a landholder to ryotwari patta regarding his private lands as defined by section 3 (10) (*a*) of the Estates Land Act is applicable also to lands or tanks appurtenant to such private lands.

MADRAS AGRICULTURISTS RELIEF ACT.

Pichuratnam Ayyar v. *Muthuratnam Ayyar*[4], decides that " house property " in section 4 (*d*) of the Madras Agriculturists Relief Act includes not only the house and the site on which it stands but also the land appurtenant to the house and needed for its enjoyment, such as the garden, compound and yard enjoyed as part of the house and the mere existence of a wall with a doorway between the house and the garden is not sufficient to treat the garden as an independent site excluding it from the scope of the proviso. *Jayarama Pillai* v. *Parvathi Ammal*[5], takes the view that under section 4 (*h*) only those categories of property belonging to a woman mentioned in the Explanation like jewellery, wearing apparel, etc., could be excluded and the mere fact that the value of the properties of a woman creditor situated outside the Indian Union exceeds Rs. 6,000 while h r properties situated within India are worth much less does not entitle her to the benefit of the exemption under section 4 (*h*). *Srinivasa Pillai* v. *Muthayya Pillai*[6], holds that Explanation III to section 8 as it stands now emphasises the identity of the debt, that so long as the identity can be traced any change or alteration in the debt or creditor would not lift the case oustide the Explanation and that the word " assign " in the Explanation does not mean " heir " but a person substituted for another and therefore will include a person executing a fresh document in pursuance of an undertaking to do so on behalf of an original debtor. *Thirumalpad* v. *Krishnan Nair*[7], states that section 9-A contemplates only an usufructuary mortgage as defined in section 58 (*d*) of the Transfer of Property Act and will not apply to an othi which is an anomalous mortgage. *Thirupathi* v. *Rajagopal Naidu*[8], makes it clear that section 9-A can apply only where in the case of a usufructuary mortgage the mortgagor seeks to redeem and so where in a composite mortgage (simple and usufructuary) the mortgagee sues for the realisation of the amount of the personal covenant the section cannot apply. *Easoop* v. *Bookutty Umma*[9], holds that section 9-A is not an overriding or self-contained provision having no relation to the procedure laid down in section 19-A for enforcing the rights of agriculturists, that so long as a mortgage debt is not outside the scope of section 19-A an application to scale down the debt as per the provisions of the section is maintainable and that it is not correct to say that the rights under section 9-A could be agitated only in a suit. *Rajagopal Naidu* v. *Kunjammal*[10], shows that section 9-A (10) (*b*) relates to the transfer by the mortgagee of his interest either wholly or in part *bona fide* and for valuable consideration and this means an absolute conveyance or renunciation of the whole bundle of rights of the mortgagee in the mortgaged property or part of it. *Ranga Iyer* v. *Chidambara Iyer*[11], lays down that the conversion of coparcenary property into a tenancy in common cannot be con-

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1. (1956) 1 M.L.J. (S.C.) 63.
2. (1956) 1 M.L.J. 200.
3. (1956) 2 M.L.J. 595.
4. (1956) 2 M L J. 286.
5. (1956) 1 M.L.J. 585.
6. (1956) 1 M.L.J. 319.
7. (1956) 2 M.L.J. 46.
8. (1956) 1 M.L J. 1.
9. (1956) 1 M.L.J. 427.
10. (1956) 1 M.L.J. 589.
11. (1956) 1 M.L J. 503.

sidered as " partition " within the meaning of section 9-A (10) (ii) (*c*). In *Sreenivasa Rao* v. *Abdul Rahim Sahib*[1], it is held that the word " interest " in scection 13 means interest legally due and payable and not interest outstanding and not paid, and hence the section will apply even when the interest has been paid and appropriated at a rate higher than what is laid down in the section. *Govindaraja Nadar* v. *Namadeva Reddiar*[2], points out that the effect of section 13-A is to extend the benefit of the Act to all agriculturists irrespective of the ban imposed by the provisos (*b*) and (*c*) to section 3 (ii) of the Act and that the benefit of the section is not in any way restricted to a debt incurred only after the Act or the Amendment of 1948. *Lakshmi* v. *Achutha Menon*[3], takes the view that a declaration under section 19-A is given as a cheap and expeditious remedy to enable the debtor and the creditor in the case of agriculturists to terminate the subsisting mortgage indicating what amount if any will be due from the debtor to the creditor, that the basis of such a declaration is that there is a subsisting enforceable debt on which the Act can operate and hence no declaration can be given if the debt has become unenforceable by the operation of the law of limitation and a suit for possession by redemption has become extinguished by reason of section 28 of the Limitation Act. *Periakaruppan Chettiar* v. *Rajamanickavasagam*[4], makes it clear that though an application under section 19-A could be made either by a creditor or a debtor their rights to apply are not co-extensive in all respects, that while a debtor can apply not only for a declaration of the amount due by him to his creditor but also for a declaration that the debt has become already discharged a creditor can only ask for a declaration of the exact amount due to him, and that if in extraordinary cases he is forced to seek a declaration that the debt due to him has been discharged he should resort to appropriate proceedings and cannot file a petition under section 19-A. *Kunhambu* v. *Yagnan Nambudri*[5], lays down that the effect of section 25 is only to safeguard the rights of a creditor and so long as such rights are not affected the alienation by the debtor would not be void between the parties and hence where in a suit for redemption filed by the debtor and his assignee the plaintiffs do not rely on the assignment to defeat the rights of the mortgagee-creditor but only make the assignment the basis of the redemption claim desiring to discharge the debt the mortgagee-creditor cannot resist the suit on the ground that the assignment is invalid under the section.

HINDU LAW.

Gopinath Shetty v. *Santamma*[6], points out that the object of an adoption under the Aliyasantana school of Hindu law is secular, namely, to perpetuate the tarwad, and therefore females are often taken in adoption ; that the law applicable to such adoptions is customary, and that the normal rule in every case of adoption whether sanctioned by law or custom being that it effects a severance of the adoptee from the family of his birth, it is for those relying on a custom to the contrary to establish it. In *Sivakami Achi* v. *Somasundaram Chettiar*[7], a Full of the Madras High Court has held that in the case of an adoption by a widower it would take effect only from the date of the adoption and not from the date of the death of his wife, that where a widower adopts the adopted boy can have no maternal relations as nothing of the deceased wife survives in her husband and the fiction of an adoptive mother is a misnomer, that the adoption by a widower could not make the deceased wife the mother of the adopted boy, and that it is not open to a widower whose two wives have already died to adopt a boy and nominate or designate the deceased second wife as the adoptive mother. *Baluswami Reddiar* v. *Balakrishna Reddiar*[8], states that any custom permitting the marriage of a man with his own daughter's daughter is so revolting to all principles of morality, decency and eugenics that a Court could not recognise such a custom however long practised and recognised by a particular community it may be. *Alagammai Achi* v. *Veerappa Chettiar*[9], lays down that a daughter is entitled to be paid her marriage expenses out of her father's estate in the same way as she is entitled to be paid her maintenance, that the right

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1. (1956) 2 M.L.J. 19.
2. (1956) 2 M.L.J. 425.
3. (1956) 2 M.L.J. 542.
4. (1956) 2 M.L.J. 233.
5. (1956) 1 M.L.J. 297.
6. (1956) 2 M.L.J. 38.
7. (1956) 1 M.L.J. 441 (F.B.).
8. (1956) 2 M.L.J. 357.
9. (1956) 2 M.L.J. 193.

rests on her interest in the joint family property and is not based on the natural obligation of the father, and that in case the girl is ripe for marriage the proper course for the Court will be to fix a maximum amount for the marriage and direct the defendant to deposit the money in Court permitting the plaintiff to draw without security the money or such part thereof as is actually required for the marriage after notice to the other side. In *Chattanatha Karayalar* v. *Ramachandra Iyer*[1], the Supreme Court points out that under the Hindu Law there is no presumption that the business standing in the name of any member of the joint family even when the member is the manager of the family is a joint family business and it makes no difference in this respect that the manager is the father of the coparceners. *Sivaramakrishna* v. *Kaveri Ammal*[2], lays down that where on the security of ancestral property money is raised for business by a coparcener and out of the profits of such business acquisitions are made and the debts on the ancestral estate are discharged before birth of a son there could be no detriment to the parental estate since the debts have been discharged before the son's birth and the ancestral property was available to him when he was born, and the subsequent acquisitions cannot be treated as coparcenary property by recourse to the theory of accession or accretion in the absence of evidence of such intention. *Ramakrishna Mardi* v. *Vishnumoorthi Mardi*[3], holds that the income received by a person as purohit being paid at the discretion of the givers either as charity or as remuneration for personal services cannot in any way amount to family property and simply because a person's study of the Vedas and the knowledge in religious ceremonies enable him to practise the profession of purohit it will not be possible to treat the income earned by him as joint family property. *Kumbakonam Bank* v. *Shanmugham Pillai*[4], points out that where trade is the kulachara of the family, if a member of the family embarks upon a different kind of commercial transaction and such business is not a speculative one the sons of such a member will be liable for the debts incurred by their father, and heredity in business is the touchstone and not the difference or novelty in the nature of the commercial undertaking. *Valappil Raman* v. *Kunhi Kannan Nambiar*[5], takes the view that when a partition of the joint family has taken place, in order to bind the son or other member of the family with the liability of the pre-partition debt, a decree must be obtained against the son and it would not be sufficient if a decree is obtained against the father alone, that it makes no difference even if the decree is obtained against the father or manager who had the represenatative character at the inception when the suit was instituted, and that in execution proceedings after the disruption of the family all the members sought to be made liable for the decree should be made parties. *Abdul Basith Sahib* v. *Shanmughasundaram*[6], lays down that for a coparcener to sever his joint status notice of severance need not be given to the other coparceners, that it will suffice if a declaration of an unequivocal intention to separate is made and manifested, and the office of manager being one coming by birth and regulated by seniority is terminable by resignation or relinquishment and is not indefeasible. *Karuppa Udayar* v. *Sellamuthu Udayar*[7], holds that on the separation of one or some of the members partitioning off their shares it is a question of fact turning upon the intention of the parties in each case whether the other members also had separated or whether they remained joint. *Ramaswami* v. *Kumaravelu Goundan*[8], states that there is nothing in Hindu Law prohibiting a father at the time of a family partition from taking cash instead of landed property for his own and his minor children's share but it would be a different matter if it is proved that the father took cash instead of lands as a result of fraud or collusion with the object of dissipating it and depriving the minors of their wherewithal. In *Ramanatha Rao* v. *State of Madras*[9] it is pointed out that the strict rule of Hindu Law as regards inheritance is based on marriage and legitimate descent and there is no system of succession or other relationship except through a valid marriage, that Courts have modified the rule on the principle that though there might be no agnatic relationship for want of lawful wedlock there is always a cognatic relationship between the mother

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1. (1956) 1 M.L.J. (S.C.) 1.
2. (1956) 1 M.L.J. 152.
3. (1956) 2 M.L.J. 550.
4. (1956) 1 M.L.J. 58.
5. (1956) 1 M.L.J. 403.

(1956) 1 M.L.J. 513.
7. (1956) 2 M.L.J. 250.
8. (1956) 2 M.L.J. 200.
9. (1956) 1 M.L.J. 579.

and the illegitimate child and succession could be claimed through such cognatic relationship, and that such relationship continues even among the descendants of such children. *Chinnaswami* v. *Pongianna Goundar*[1], declares that the rule is universal both under Mitakshara and Dayabhaga that no nephew can succeed so long as there is any brother capable of taking and that the son of a deceased brother cannot claim to succeed along with the brother on the theory of representation. In *Neelambal Ammal* v. *Rajaratnam Pillai*[2], it is pointed out that no hard and fast rule can be laid down with respect to whether a Hindu widow in possession of very little property left by her husband can or cannot sell the same for her future maintenance, and that if the circumstances of the case warrant it will be perfectly legitimate for her to sell her husband's property where it is small and does not yield sufficient income for her future maintenance. *Perundevi Ammal* v. *Amawasikan*[3], holds that where there is a resumption of cohabitation between the spouses subsequent to the obtaining by the wife of a decree for separate maintenance and the wife gives birth to a child the maintenance decree is wiped off and is no longer executable, inasmuch as the effect of the resumption of cohabitation puts an end to the very basis of the decree and puts the parties back precisely where they were before the decree was passed. *Velu Servai* v. *Srinivasa Iyengar*[4], decides that a mere construction by a Hindu widow of a house with her funds on a vacant site forming part of her husband's estate would not by itself be sufficient to show that she intended to renounce her rights to the house and treat it as part of her husband's estate, and that where after the construction the widow had dealt with the house in transactions by her as her absolute property it cannot be held that the widow intended to give up her right to the superstructure for the benefit of her husband's estate. *Kunjammal* v. *Malayappa Iyer*[5], holds that it is not the law that wherever the estate or a large part of it in the hands of a limited owner consists of movable property a receiver may be appointed at the instance of the reversioners, but there must be further proof that the conduct of the limited owner has been such as to raise a reasonable apprehension of waste or fraudulent secretion to the detriment of the reversioners. *Palani Goundan* v. *Vanjiakkal*[6], states that in order to become a *de facto* guardian of a minor there must be a continuous course of conduct as a guardian in regard to the property, the duration of such period being dependent upon the circumstances of each case, that the dealings with the estate by a *de facto* guardian by way of sale or mortgage are not void altogether but voidable at the instance of the minor after attaining majority, that the same tests as to legal necessity or benefit will be applied as in the case of *de jure* guardian to determine the validity of such transactions, that the right to avoid the transaction is a purely personal privilege available to the minor alone, and that it is only a right to sue and is not heritable.

COURT FEES ACT.

Sankaranarayana Pillai v. *Kandasami Pillai*[7], points out that where a minor is *eo nominee* a party to a sale deed or other document of alienation by a guardian which he seeks to set aside it is not enough for him to sue merely for possession and pay Court-fee under section 7 (v) of the Court-fees Act, but he must sue for the cancellation of the document and pay Court-fee under section 7 (iv-A). *Muthiah Chettiar* v. *Narayanan Chettiar*[8], holds that a preliminary decree in a partition suit declaring the shares of parties and directing an account to be taken of the assests and liabilities of the family is not a decree for money or property within the meaning of section 7 (iv-A) and a suit by a minor for a declaration that such a decree is not binding on him should be valued under Article 17-A (1) of Schedule II and the value of the suit for purposes of jurisdiction will decide the fixed Court-fee payable on the relief prayed for. *Seethalakshmi Ammal* v. *Ramachandran*[9], states that the principle that where the plaintiff has not initially given any valuation as regards a particular relief the valuation of such relief for purposes of jurisdiction would also govern the valuation for purposes of Court-fee and the plaintiff cannot be permitted to reduce the value arbitrarily at the appellate stage by seeking to amend the plaint cannot apply to a case where the plaintiff has once valued the relief or is deemed to have valued it for purposes of Court-fee under section 7 (iv) (*b*). *Ganga Naicken* v. *Sundaram Iyer*[1], decides that a copy application in proceedings instituted before the Madras Court Fees Act (XIV of 1955), is a proceeding before the commencement of the Act within the meaning of section 87 and will be governed or regulated in the matter of Court-fee by the earlier Act and Rules. *Meenakshisundaram Pillai* v. *Ponnu*[2], rules that where property was sold with a contemporaneous agreement to reconvey the property to any one nominated by the vendor within a specified time and in default thereof to any person of the vendee's own choice and the vendee was to take the price paid out of the sale proceeds and pay the balance to the vendor and a suit was brought by the latter for recovery of the properties on the basis that the vendee had already sold some of the properties to the value of the price paid by him and should therefore return the remaining properties as per the contemporaneous agreement, the suit, though peculiar, cannot be regarded as one incapable of valuation under Article 17-B and is really one for accounting regarding the sale proceeds by the vendee on resale and that Court-fee should be paid on the reasonably anticipated profits tentatively valued by the plaintiff with liberty to pay Court-fee on any higher amount that may be found as in account suits.

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[1] (1956) 2 M.L.J. 567.
[2] (1956) 1 M.L.J. 245.
[3] (1956) 2 M.L.J. 610.
[4] (1956) 2 M.L.J. 60.
[5] (1956) 2 M.L.J. 67.
[6] (1956) 1 M.L.J. 498.
[7] (1956) 2 M.L.J. 411.
[8] (19 6) 2 M.L.J. 608.
[9] (1956) 2 M.L.J. 503.

EVIDENCE ACT.

Narasimha Rao v. *Someswar Joshi*[3], rules that section 73, Evidence Act, requires that the writing with which the disputed handwriting is to be compared, that is to say, the standard writing has to be admitted or proved to be the writing of the person to whom it is attributed and the disputed writing which is to be compared with the standard must also purport to be the writing of the same person. In *Shambu Nath Mehra* v. *State of Ajmer*[4], the Supreme Court points out that section 106 is an exception to section 101 which lays down the general rule that the burden of proof in a criminal case is on the prosecution, and that section 106 cannot be used to undermine the well-established rule of law that save in very exceptional cases the burden is on the prosecution and never shifts. In *Wasim Khan* v. *State of Uttar Pradesh*[5], the Supreme Court holds that recent possession of property of a deceased in circumstances clearly indicating that he had been murdered and robbed would suggest not only that the possessor of the property was a thief or a receiver of stolen property but that he had also been guilty of a more aggravated crime which had connection with the theft.

LIMITATION ACT.

Murugesan v. *Hameed Maracayar*[6], lays down that the provisions of section 5 of the Limitation Act cannot apply to excuse the delay in filing an appeal under section 12 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, 1949, beyond the prescribed period of fifteen days. *Karupanna Goundan* v. *Ponnuthayee*[7], decides that a judgment-debtor who is kept out of the knowledge of an execution sale by fraud can in an application under Order 21, rule 90, Civil Procedure Code, to set aside the sale invoke the aid of section 18 of the Limitation Act to extend the period of limitation where the fraud is proved to have been committed by the decree-holder or the auction-purchaser or both, and that though it is true that under section 18 the fraud must be that of the person against whom the suit or application is made inasmuch as both the decree-holder and the auction-purchaser are necessary parties to the application for setting aside the sale, the application must be deemed to be directed against both and hence the fraud of the one or the other would be sufficient to have the sale set aside. *Adiraja Ariga* v. *Beeranna Rai*[8], holds that the words "period prescribed" in section 19 refers only to the period prescribed by

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[1] (1956) 1 M.L.J. 63.
[2] (1956) 2 M.L.J. 559.
[3] (1956) 2 M.L.J. 399.
[4] (1956) 2 M.L.J. (S.C.) 1.
[5] (1956) 2 M.L.J. (S.C.) 9.
[6] (1956) 1 M.L.J. 238.
[7] (1956) 1 M.L.J. 190.
[8] (1956) 2 M.L.J. 218.

Schedule I of the Limitation Act and not to any extended period for the institution of suits by virtue of the application of section 4 if the Courts are closed on the date the period of limitation expires, and an acknowledgment of a debt during such an extended period might save the debt from being barred only in certain cases. *Ramgopal Naicker* v. *Muthukrishna Ayyar*[1], states that an acknowledgment of a liability due by a person by the official receiver in whom the person's estate vests in insolvency is enough to constitute an acknowledgment within the meaning of section 19. *Chockalinga Tevar* v. *Kailasa Tevar*[2], decides that where the Court merely orders the issue of a cheque in favour of a judgment-debtor and no payment is made out by the Court it does not follow that it is a duly authorised agent of the judgment-debtor within the meaning of section 20 so as to give a fresh period of limitation from the time of payment. In *Ramanna Shetty* v. *Tejappa Shetty*[3], it is pointed out that a suit to work out the substantive rights declared in a partition deed under which the division by metes and bounds is postponed to a future date on the happening of a particular event is not a suit for specific performance of a contract and will not be governed by Article 113, but if the claim is one for mesne profits it would be governed by Article 120 in the case of normal co-owners and by Article 113 if based on any express covenant in the deed. *Lakshmana Pillai* v. *Emkalaperumal Nadar*[4], states that by enacting Article 134-B it was not intended to make any change in the law with regard to the alienation of the office of the manager or office of trusteeship which would be governed by Article 124, and Article 134-B only provides the period of limitation applicable where the manager for the time being has alienated the property of the institution for valuable consideration. *Bilige Laskhminarayana Rao* v. *A. P. Fernandes*[5], lays down that where a Hindu widow has alienated an item of property and afterwards made a surrender of the rest the starting point of limitation for a suit by the surrenderee to recover possession of the alienated item is the date of the surrender and not the date of the death of the widow whether Article 141 or 144 applies and a suit instituted beyond twelve years from the date of the surrender but within twelve years from the date of the widow's death is barred by limitation. *Prabhakaran Thampan* v. *Chami Mannadiar*[6], decides that where possession had passed to the alienee under a conveyance by the stani in the absence of legal necessity or benefit to the stanom, a suit by the succeeding stani to recover possession should be brought within twelve years from the date of his succession, and if he does not challenge and more than twelve years elapse before he dies the next person succeeding to the stanom cannot maintain a suit and will be barred. In *Ramanna* v. *Nallaparaju*[7], the Supreme Court points out that Article 165 applies only to applications for being restored to possession by persons other than the judgment-debtors and so an application by a judgment-debtor claiming relief on the ground that his properties had been erroneously taken in execution of the decree will not be governed by it. The Supreme Court also points out that Article 166 applies only when the sale is one which has under the law to be set aside, as for example, under Order 21, rules 89 to 91, but it has no application when the sale is inoperative and void, in which case, an application for appropriate reliefs and to have the sale declared void would be governed by Article 181. *Chockalinga Tevar* v. *Kailasa Tevar*[2], decides that a request to a Court to issue a cheque made by the decree-holder in a suit other than the one the decree in which is the subject of execution proceedings will not be a step-in-aid of execution of the decree within the meaning of Article 182 (5). *Kaliappa Reddiar* v. *Thangamuthu*[8], holds that to find out whether an order on an execution application, be it one made by the Court on its own initiative or on the invitation of the decree-holder, is a final order for purposes of Article 182 (5), the circumstances under which the order was passed should be the guiding factor, and where the execution petition was dismissed as not pressed and it was found that the order was one passed for showing disposals, a subsequent application by the decree-holder for execution beyond three years

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1. (19 6) 2 M.L.J. 421.
2. (1956) 2 M.L.J. 34.
3. (1956) 1 M.L.J. 239.
4. (1956) 2 M.L.J. 109.
5. (1956) 2 M.L.J. 211.
6. (1956) 1 M.L.J. 289.
7. (1956) 1 M.L.J. (S.C.) 71.
8. (1956) 2 M.L.J. 301.

of the date of dismissal of the prior one is not a fresh application but is one to revise the prior one and therefore is not barred by limitation under Article 182 (5).

CIVIL PROCEDURE CODE.

In *Premier Life & General Insurance Co., Ltd.* v. *Krishna Seth*[1], it is held that the insurer of a motor car against third party risk who though notified of a suit for recovery of damages against the owner and driver in respect of an accident suffered did not contest the claim is a judgment-debtor within the meaning of section 2 (10) of the Civil Procedure Code where the decree passed though against the owner and driver was executable in the first instance against the insurer. *Guruvayur Devaswom Trustees* v. *Kuttikrishna Menon*[2], states that section 9 lays down a general rule in favour of civil Court's jurisdiction and it is for the party who maintains an exception to it to prove it. *Muthiah Chettiar* v. *K. S. Rm. Firm*[3], points out that a party who has obtained a judgment in a foreign Court can sue upon it and such judgment will be conclusive except in the circumstances set out in clauses (*a*) to (*f*) of section 13. In *Arunachalam Chettiar* v. *Murugappa Chettiar*[4], it is pointed out that if a note is executed at one place and delivered at another or is made payable at another place part of the cause of action within the meaning of section 20 (*c*) arises at each one of those places and the suit may be filed at any place at the option of the plaintiff. *Jambulinga Mudaliar* v. *Vadivelachari*[5], states that section 42 providing for the execution of transferred decrees is a special provision overriding section 13 of the Civil Courts Act and therefore the forum to which an appeal would lie from a decision of a Munsif's Court when a decree has been transferred to it for execution by a higher Court is the latter Court. *Muthiah Chettiar* v. *K. S. Rm. Firm*[3], declares that where there is no arrangement establishing reciprocity between India and another country the decree of whose Court is sought to be executed section 44-A cannot apply. In *Jai Narain Ram* v. *Kedar Nath*[6], the Supreme Court points out that inasmuch as the executing Court has to see that the defendant gives the plaintiff the very thing that the decree directs, and if there is any dispute about its identity or substance nobody but the executing Court can determine it, it is a matter relating to the execution, discharge and satisfaction of the decree, and under section 47 it can only be determined by the Court executing the decree. *Raghavan Nair* v. *Achuthan Nair*[7], takes the view that though it is not yet settled whether an auction-purchaser in a sale held in execution of a mortgage decree is a representative of the mortgagor judgment-debtor or of the mortgagee-decree-holder, yet a dispute between the auction-purchaser and certain party defendants claiming rights under the mortgagors can still be a matter that could be inquired into under section 47 as the mortgagee decree-holder is interested in supporting the claim of the auction-purchaser and the matter is one in execution. In *Ramanna* v. *Nallaparaju*[8], the Supreme Court holds that though when an execution sale is impugned on the ground that it is not warranted by the terms of the decree the question could be agitated when it arises between the parties to the decree by an application under section 47 and not by a separate suit still under clause (2) of the section the Court has the power to treat the plaint as an application under section 47 provided that on the date such plaint was presented an application for the relief claimed was not barred by limitation and provided further that the Court in which it was filed was competent to execute the decree. *Narasimha Rao* v. *Someswar Joshi*[9], decides that where on a comparison of the signatures by itself the Court holds the disputed signature to be genuine, the High Court will not interfere under section 115 in revision. *Narasimhachari, In re*[10], is of the view that when once an application under Order 34, rule 5, for the passing of a final decree is disposed of by an order to issue the final decree it becomes appealable and no revision will lie. *Subbu Thaiammal* v. *Rangaswami Naicker*[11], holds that the bar of Order 2, rule 2, will not operate where there was omission to include a claim for an instalment of rent in suit filed after it fell due but the agreement between the parties had given the plaintiff the option to claim any instalment subsequent to the due date at any time he choses with interest. *Murugayyan Kangiar* v. *Marudayammal*[1], points out that the words " where the defendant or his agent or such other person as aforesaid " in Order 5, rule 17, are wide enough to cover the case of a defendant refusing to sign the acknowledgment of receipt of a summons sent to him by registered post under Order 5, rule 9 (3) (Madras Amendment 1951). *Komaraswami Pillai* v. *Venkatarama Rao*[2], holds that even assuming that Order 6, rule 17, is applicable in dealing with an application for amendment of an election petition the provision will not permit a new charge to be added by way of an amendement. *Subramaniam* v. *Ramachandra Beharilal*[3], declares that Order 6, rule 17 can apply so as to allow amendment of cause title at any time before or after judgment and the Court has jurisdiction to alter it by describing the defendant in the name claimed by him to be his correct name though trading in another name. In *Balakrishnan* v. *Balachandran*[4], it is held that where a Court regarded the defendant as a lunatic without making any inquiry under Order 32, rule 15 and appointed a guardian to represent him in the suit and the latter did not put up a proper or sufficient defence with the result that a decree was passed against the defendant, such decree must be considered to be an *ex parte* decree and has to be set aside as an *ex parte* decree under Order 9, rule 13. *Kuppammal* v. *Pethanna Chetty*[5], lays down that the mere fact that an endorsement has been made by the Court as required by Order 13, rule 4, on a document produced before it should not in every case be considered sufficient to hold that the document has been admitted and where the objection to its admissibility has not been considered by the Court the endorsement must be deemed to be a purely mechanical act. In *Jai Narain Ram* v. *Kedar Nath*[6], the Supreme Court points out that the remedy provided in Order 21, rule 32 (1), though available in execution of a decree for specific performance cannot be used by a person who by reason of his own incapacity to perform his part is precluded from seeking execution. *Karunakaran Nair* v. *Chathu*[7], holds that normally a failure to issue a notice under Order 21, rule 66, to the judgment-debtor, without more, would not make the execution sale null and void but would only be an irregularity, especially if the evidence shows that the judgment-debtor was aware of the sale proclamation and the sale. *Ranga Rajendran* v. *Ramanathan Chettiar*[8], takes the view that where the execution sale is adjourned after the settlement of the terms of the sale proclamation not at the discretion of the Court but because of a new statutory provision staying all such proceedings for a year there is no need for a fresh proclamation in the manner provided by Order 21, rule 66. *Ravulla* v. *Imbichi Koya*[9], holds that there is no right of appeal from an order passed by an executing Court in a claim petition in execution under Order 21, rule 101 and the only remedy of the aggrieved party is to file a regular suit to set aside the order. *Athiappa Gounder* v. *Periasami Gounder*[10], declares that inchoate negotiations cannot be treated as adjustments and even if some of the terms of an alleged compromise are in dispute it cannot be recorded by the Court as there is no adjustment within the meaning of Order 23, rule 3. In *Anganna Goundan* v. *Angamuthu Goundan*[11], it is pointed out that considering the scheme of Order 33, the result of sub-rule (*d*) (1) of rule 5 added by the Madras Amendment is that if a Court is satisfied that any suit sought to be filed *in forma pauperis* is barred by any law it can reject the application for permission to sue as a pauper after examining the applicant only without hearing the other side. *Muhammad Zackria* v. *Abdul Karim*[12], takes the view that evidence given on commission will not be equal in every respect to evidence given in open Court, that evidence given in black and white in cold print does not speak with the same validity as evidence given by a living witness before a living Judge who hears him and has to form an opinion about the matter covered by his evidence, and that where in a suit to recover an amount evidenced by a settlement of accounts the defendant denies his signature in the accounts, the defendant if he wants to give evidence must appear in person and the refusal to issue a commission is not a wrong exercise of discretion under Order 26, rule 14. *Balakrishnan* v. *Balachandran*[1], emphasises that Order 32, rule 15, is intended to ensure that no man is adjudged a lunatic without proper inquiry, that the Court should hold a judicial inquiry and may seek the assistance of medical experts, and that the only safe course for the Courts to adopt is to follow strictly the procedure prescribed in Order 32, rule 15. *Devaki* v. *Rajagopal Naidu*[2], lays down that in determining whether a mortgagor asking for leave to sue *in forma pauperis* in a suit for redemption of a mortgage is or is not a pauper within the meaning of Order 33, rule 1, the value of the equity of redemption has to be excluded and it cannot be said that the requisite money for the payment of Court-fee could be raised by encumbering the equity of redemption. *Ramanathan Chettiar* v. *Kannathal Achi*[3], states that an order of dismissal of an application under Order 34, rule 6, for whatever reason is a decree and hence only a regular appeal will lie against such order. In *Assan Kutty* v. *Kunhi-Moideen Kutty*[4], it is pointed out that the provision in Order 41, rule 21, which, adopting the language of Order 9, rule 13, in the case of suits, lays down that where an appeal is heard *ex parte* and judgment pronounced against the respondent he may apply to the appellate Court to rehear the appeal and the Court shall do so if he satisfies it that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called for hearing will hardly apply to a case in which an advocate was engaged to appear and has been presumably paid a fee for his appearance. *Mahadeva Gurukkal* v. *Commissioner, H. R. E. Board*[5], holds that for granting a review on the ground of discovery of new evidence the Court is not called upon to see that the evidence, if believed, would be conclusive, but has simply to be satisfied that the new evidence is *prima facie* important and fit to be considered. *Ratnavelu Mudaliar* v. *Kamalabai Ammal*[6], states that what a judgment-debtor has failed to carry out in pursuance of a decree governing two suits with inter-related and independent conditions could not be enforced against him by means of a review application instead of by way of execution of the decree itself.

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[1] (1956) 1 M.L.J. 408.
[2] (1956) 1 M.L.J. 524.
[3] (1956) 2 M.L.J. 239.
[4] (1956) 2 M.L.J. 372.
[5] (1956) 1 M.L.J. 72.
[6] (1956) 1 M.L.J. (S.C.) 151.
[7] (1956) 2 M.L.J. 534.
[8] (1956) 1 M.L.J. (S.C.) 71.
[9] (1956) 2 M.L.J. 399.
[10] (1956) 1 M.L.J. 566.
[11] (1956) 2 M.L.J. 300.

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[1] (1956) 2 M.L.J. 86.
[2] (1956) 1 M.L.J. 40.
[3] (1956) 2 M.L.J. 64.
[4] (1956) 1 M.L.J. 459.
[5] (1956) 1 M.L.J. 52.
[6] (1956) 1 M.L.J. (S.C.) 151.
[7] (1956) 1 M.L.J. 47.
[8] (1956) 1 M.L.J. 173.
[9] (1956) 1 M.L.J. 572.
[10] (1956) 2 M.L.J. 94.
[11] (1956) 1 M.L.J. 300.
[12] (1956) 2 M.L.J. 371.

CRIMINAL LAW.

In *Bimbadhar Pradhan* v. *State of Orissa*[7], the Supreme Court points out that the offence of criminal conspiracy under section 120-B, Indian Penal Code, consists in the very agreement between two or more persons to commit a criminal offence irrespective of whether or not those offences have actually been committed, that where the circumstances justify it one person can be convicted of the offence of criminal conspiracy on the same evidence on which the other alleged conspirators are acquitted, and that the rule of English Law as to the acquittal of an alleged conspirator following from the acquittal of the other when the conspiracy was said to be between the two and in a joint trial of both based on the principle that repugnancy or contradiction on the face of the record is a ground for annulling a conviction, is not by itself a sufficient ground for quashing a conviction in India where the matter is governed by statutory law both as to the offence and the procedure for bringing the offender to justice. In *Topan Das* v. *State of Bombay*[8], the Supreme Court lays down that if four named individuals were charged with having committed the offence under section 120-B and if three out of the four were acquitted of the charge the remaining accused could never be guilty of the offence of criminal conspiracy. In *Willie Slaney* v. *State of Madhya Pradesh*[9], the Supreme Court states that an omission to frame a separate charge in the alternative under section 302 simpliciter is a curable irregularity provided there is no prejudice to the accused. In *Tilkeshwar Singh* v. *State of Bihar*[1], it is held by the Supreme Court that when the charge on which the accused persons were tried was one under section 302 read with section 34 it is open to the High Court to convict them under section 326 read with section 149. In *Manilal Akhaney* v. *State of Bombay*[2], the Supreme Court points out that for an offence under section 409 the first essential ingredient to be proved is that property was entrusted ; that entrustment in this connection does not mean the creation of a trust with all the technicalities of a trust ; and that it will suffice if there is a relationship whereby the owner of the property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event, so much so the person transferring the possession still continues to be the legal owner of the property and the transferee has only custody of it for the benefit of the other party.

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[1] (1956) 1 M.L.J. 459.
[2] (1956) 2 M.L.J. 258.
[3] (1956) 2 M.L.J. 174.
[4] (1956) 1 M.L.J. 496.
[5] (1956) 1 M.L.J. 309.
[6] (1956) 1 M.L.J. 378.
[7] (1956) 2 M.L.J. (S.C.) 13.
[8] (1956) 1 M.L.J. (S.C.) 60.
[9] (1956) 1 M.L.J. (S.C.) 100.

CRIMINAL PROCEDURE CODE.

Rajagopala Ayyangar, In re[3], holds that in a case where the charge sheet was filed by the police and the prosecution is in the hands of the Assistant Public Prosecutor the complainant is only a witness and has no *locus standi* to file a petition to award a deterrent punishment or convert a calendar case into a Preliminary Register Case. In *Bed Raj* v. *State of Uttar Pradesh*[4], the Supreme Court takes the view that an appellate Court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed on the face of the judgment and that in a matter of enhancement there should not be interference when the sentence passed imposes substantial imprisonment and that interference is only called for when it is manifestly inadequate. *Moorthy*, In re[5], lays down that though admission of inadmissible evidence by a trial Court would vitiate a criminal trial that mere fact is not sufficient for an appellate Court to acquit an accused or order a retrial, and though the admission of inadmissible evidence would amount to a misdirection the appellate Court has to consider in such cases whether the evidence remaining on record after excluding the inadmissible evidence from the record is sufficient to maintain the conviction. *Dhanushkodi Nadar*, In re[6], holds that where the jury at the Sessions trial is supplied even at the commencement of the trial with the entire evidence oral and documentary as well as the statement of the accused, etc., in the trial Court it is possible that the jury is influenced by such evidence with the result that such a procedure would vitiate the trial and it cannot always be that the appellate Court could ignore the inadmissible evidence and come to its own conclusions on the evidence recorded during the Sessions trial. *State of Madras* v. *Parvathi Ammal*[7], states that though section 12, Criminal Procedure Code, contemplates the Provincial Government appointing certain persons as Magistrates of the first, second or third class, it does not involve, however, that there are at any time a definite number of Magistrates of each class in any district. *Seetharaman*, In re[8], decides that the detention under section 123, Criminal Procedure Code, in default of furnishing security ordered under section 118 is no doubt in one sense preventive but is entirely different from the preventive detention contemplated in Article 22 (4) of the Constitution, and hence the provisions of section 123 providing for detention for failure to give security ordered after a full trial by the Court cannot be held to be void or *ultra vires*. In *Tilkeshwar Singh* v. *State of Bihar*[1], the Supreme Court points out that the evidence of witnesses is not inadmissible for the reason that the statements had been recorded by the investigating officer jointly and not severally as required by section 161 (3), and that while the failure to comply with the requirements of the provision might affect the weight to be attached to the evidence of witnesses it does not render it inadmissible. *Moorthy*, In re[9], states that identification parades though

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1. (1956) 1 M.L.J. (S.C.) 126.
2. (1956) 2 M.L.J. (S.C.) 49.
3. (1956) 1 M.L.J. 210.
4. (1956) 1 M.L.J. (S.C.) 28.
5. (1956) 2 M.L.J. 43.
6. (1956) 1 M.L.J. 414.
7. (1956) 2 M.L.J. 401.
8. (1956) 1 M.L.J. 232.
9. (1956) 1 M.L.J. 43.

arranged by the police should not be directed and supervised by them but should be left to the Honorary Magistrate and the Panch witnesses solely, so that the statements made by the identifiers would be outside the purview of section 162, Criminal Procedure Code. *Thothan*, In re[1], lays down that no confession recorded by a Magistrate of any rank without conforming to the provisions of section 164 is admissible in evidence. *Krishnaswami and others*, In re[2], takes the view that after filing the charge sheet under section 173 there can be no further investigation into the case by the police and therefore any person examined by them cannot be put forward before the Court as witness for the prosecution in support of their case. In *Matajog Dobey* v. *H. C. Bhari*[3], the Supreme Court holds that section 197 is not rendered *ultra vires* by Article 14 of the Constitution as the discrimination is based upon a rational classification, and public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require any such safeguard. It is further held that in order to necessitate sanction under section 197 there must be a reasonable connection between the act complained of and the discharge of official duty and the act must bear such relation to the duty that the accused could lay a reasonable claim that he did it in the course of the performance of his duty. *Manilal Akhaney* v. *State of Bombay*[4], holds that omissions in the charge cannot be regarded as material unless in terms of section 225 it is shown by the accused that he had in fact been mislead by such omission or that there had been a failure of justice as a result of such or omission. *Moorthy*, In re[5], points out that though under section 298 (2) the trial Judge, in a sessions case, in the course of his summing up, may, if he thinks proper, express to the jury his opinion upon a question of fact, he ought not to express his opinion in terms too dogmatic though he informs them that they are not bound by any opinion of his, and that it would not be proper to treat such cases as cases of misdirection if upon the general view taken the case has been fairly left to the jury's province. In *Moseb Kaka Chowdhury* v. *State of West Bengal*[6], the Supreme Court lays down that what is required under section 307 is not merely disagreement with the verdict of the jury but the additional factor that the Sessions Judge is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. In *Chandi Prasad Singh* v. *State of Uttar Pradesh*[7], the Supreme Court expresses the view that section 307 applies in terms only to trials with the aid of a jury and that there is no power in the Sessions Court to refer cases tried with the aid of assessors for decision of the High Court under that section. *Thothan*, In re[1], states that since the object of the examination of the accused under section 342 is to give him an opportunity to explain the circumstances against him the Judge examining the accused under that section should frame simple separate questions for each one of the circumstances relied on by him and put them separately to the accused so that he could be in a position to understand them and explain. *Machandar* v. *State of Hyderabad*[8], stresses the point that when magistrates and Sessions Judges fail to carry out the duty cast on them by section 342, of questioning the accused fairly and properly bringing home to his mind in clear and simple language the exact case he has to meet and each material point that is sought to be made against him and of affording him a chance to explain them if he can and so desires, Courts of appeal are compelled to acquit the accused. In *Mathew* v. *State of Travancore*[9], the Supreme Court points out that if the accused is not afforded the opportunity he is entitled to under section 342 he can ask the appellate Court to place him in the same position as he would have been in had he been asked ; in other words, he is entitlied to ask the appellate Court which is the ultimate Court of fact to take the explanation he would have given in the first Court into consideration in weighing the evidence in just the same way as it would have done if it had been there all along ; but if he does not ask this in the last Court of fact he is in little better position when the case comes to the Supreme Court than he would have been in had he, say, omitted to call in his defence a witness who, he says, would have deposed in his favour. In *Aher Raja Khima* v. *State of Saurashtra*[1], the Supreme Court holds that in interfering under section 417 it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial Court was wrong ; and if the trial Court had taken a reasonable view of the facts of the case interference under section 417 is not justifiable unless there are really strong reasons for reversing that view. *Jayaram Vithoba* v. *State of Bombay*[2], declares that under section 439 (1) the High Court in hearing a revision case can exercise the power of a Court of appeal under section 423 and may enhance the sentence, and the law does not prescribe that particular formalities should be complied with before action is taken under section 439 (2), and it only provides that the accused should have an opportunity of showing cause against the conviction and enhancement. *Parvathi Ammal* v. *Gopala Goundar*[3], takes the view that where it is clear that the two parties to the marriage went through some form of marriage, and it is established that they were living as man and wife, the general presumption is in favour of a valid marriage and the wife is entitled to maintenance under section 488. *Kulandaivelu Chettiar* v. *Ayinan Chettiar*[4], lays down that a bail order passed by a Court releasing a prisoner must be given immediate effect to and departmental instructions which in effect nullify such orders, such as that no prisoner should be released on a Sunday or jail holiday on bail cannot be allowed to stand and continue in force. *Kanniyan*, In re[5], states that the limitations imposed by clause 8 of section 526 are not all of them to be read into clause (1-C) of section 528 and that the latter provision gives ample jurisdiction to the Sessions Judge to order any particular case to be transferred from one criminal Court to another criminal Court in the same sessions division though the evidence in the case has been closed and arguments heard. In *Willie Slaney* v. *State of Madhya Pradesh*[6], the Supreme Court holds that the omission in the generality of cases to frame a charge is not *per se* fatal. *Krishnaswami and others*, In re[7], points out that though the Court has got certain powers under section 540, Criminal Procedure Code, to examine any person as a witness if the evidence of such person appears to it essential to the just decision of the case, the discretion is not unlimited but one to be exercised judicially, and if the Court feels that any matter has arisen *ex improviso* which could not have been contemplated by the prosecution the Court is entitled to examine them as Court witnesses but their evidence cannot be used to fill up gaps in the prosecution.

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[1] (1956) 1 M.L.J. 206.
[2] (1959) 2 M.L.J. 2.
[3] (1956) 1 M.L.J. (S.C.) 79.
[4] (1956) 2 M.L.J. (S.C.) 49.
[5] (1956) 2 M.L.J. 43.
[6] (1956) 2 M.L J. (S.C.) 33.
[7] (1956) 1 M.L.J. (S.C.) 88.
[8] (1956) 1 M L.J. (S.C.) 25.
[9] (1956) 1 M.L.J. (S.C.) 130.

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1. (1956) 1 M.L.J. (S.C.) 135.
2. (1956) 1 M.L.J. (S.C.) 92.
3. (1956) 2 M.L.J. 468.
4. (1956) 1 M.L.J. 469.
5. (1956) 2 M.L.J. 429.
6. (1956) 1 M.L.J. (S.C.) 100.
7. (1956) 2 M.L.J. 2.

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NOTES OF INDIAN CASES.

SUBRAMANYA BHATTA *v.* DEVADAS NAYAK, (1955) 2 M.L.J. 625.

This is an interesting decision on Arbitration Law. The rules governing arbitration were originally embodied in Schedule II of the Civil Procedure Code. Under that Law an appellate Court had powers to refer to arbitration the disputes between the parties to the appeal. This was by virtue of the provision in section 107 of the Code under which an appellate Court had the same powers and could perform the same duties as are conferred or imposed upon a Court of original jurisdiction by the Code. The provisions of Schedule II of the Code were repealed and re-enacted in the Arbitration Act of 1940. The question arose whether an appellate Court will still have the same powers to refer to arbitration as it had before. Chapter IV of the Arbitration Act deals with arbitration in pending suits. Section 21 which occurs in that chapter lays down that in any suit if all the parties interested agree that any matter in dispute in the suit between them shall be referred to arbitration, they may apply to the Court for an order of reference. According to section 2, clause (*c*) "Court" means "a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court." In *Thakur Prasad* v. *Baleswar Ahir*[1], the Patna High Court held that the term "Court" in section 2, clause (*c*) includes an appellate Court as well. The learned Judges observed : " Examining the definition of the term ' Court ' as given in section 2 (*c*), Arbitration Act......there seems no valid ground for holding that it exlcudes an appellate Court. Just as a Court of first instance has 'jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit', so also, an appellate Court has the same jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit. This is the function of an appellate Court as well." A different view as to the meaning of the term ' Court ' in section 2, clause (*c*), has been taken by a Full Bench of the Allahabad High Court in *Moradhwaj* v. *Bhudar Das*[2], where it was held that ' Court' means a Court of original jurisdiction only and does not include a Court of appeal or execution proceedings. The reason assigned was that Chapters II and III of the Act deal with cases of arbitration where there is no suit pending ; that the Court which is called upon to function in such cases is the Court of original jurisdiction ; and so, the word ' Court ' occurring in section 21 of Chapter IV should carry the same meaning. The Calcutta High Court also has considered the question in *Abani Bhushan Chakrabarti* v. *Hem Chandra Chakrabarti*[3], and it has laid down that the term 'Court' will not in the context of section 21 include an appellate Court. In the first place, it is pointed out that the jurisdiction exercised by an appellate Court is a special jurisdiction which will not necessarily confer jurisdiction to decide the questions of fact involved if they had been the subject-matter of a suit. Secondly, it was said that the question whether an

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1. A.I.R. 1954 Pat. 106.
2. A.I.R. 1955 All. 353 (F.B.).
3. I.L.R. (1946) 2 Cal. 492 : A.I.R. 1947 Cal. 93.

appellate Court was empowered to refer a matter to arbitration cannot be dependent on any such consideration as whether that Court had pecuniary jurisdiction to decide the question at issue if it had formed the subject of a suit. The Court observed: "The jurisdiction of lower appellate Court is derived from Chapter III or IV, Bengal, Agra, and Assam Civil Courts Act, 1887. Under section 21 of that Act appeals from the decisions of Subordinate Judges in cases in which the value of the suits does not exceed Rs. 5,000, and from the decisions of Munsifs in all cases lie ordinarily to the District Judge. Other Courts subordinate to the High Court have ordinarily no inherent power of hearing appeals. This jurisdiction to do so is a special one derived from the transfer of appeals to them for disposal by the District Judge in exercise of the powers conferred by section 22 of the Civil Courts Act. The lower appellate Courts have of course the power to enter into and decide questions of fact and to that extent it may be said that they have jurisdiction to decide questions forming the subject-matter of the reference, but this jurisdiction is the special jurisdiction of the appellate Court and in that capacity they would have no jurisdiction to decide those questions if they had been the subject-matter of a suit. In this view of the matter we do not think that a 'Court' as defined in th Arbitration Act will include an appellate Court." The learned Judges added that 'Court' as defined in the Arbitration Act does not include an appellate Court and consequently there is nothing in that Act which enables an appellate Court to refer to arbitration matters in dispute between the parties. The instant decision has adopted the view of the Patna High Court in regard to the meaning of the term 'Court' in section 21 of the Arbitration Act. Adverting to the reasoning of the Judges of the Allahabad Full Bench on the matter, it points out that it is only an accident that the appellate Court will not be called upon to function under Chapters II and III, because there is the Court of original jurisdiction to exercise those functions on the principle embodied in section 15 of the Civil Procedure Code and not because there is anything in the definition itself necessarily excluding an appellate Court. There is much to be said for the view that the 'jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit' should be understood as referering to original jurisdiction and not to jurisdiction to decide in appeal. The reference to Small Cause Court in the section would suggest that the section is not contemplating appellate Courts. The Allahabad High Court has, however, reached the conclusion in favour of an appellate Court having the power to refer to arbitration on another line of reasoning. According to it, the appellate Court will have the power by virtue of section 8 of the General Clauses Act taken along with section 107 of the Civil Procedure Code even after the repeal of Schedule II of the Code and the enactment of the Arbitration Act. The Allahabad High Court said: " The Arbitration Act repeals and re-enacts the provisions of Schedule II of the Civil Procedure Code. Section 107, Civil Procedure Code, conferred upon the appellate Court the same powers and the same duties as nearly as may be conferred and imposed by the Code on the Courts of original jurisdiction in respect of suits instituted therein. The word 'Code' included Schedule II also, and therefore, it was held that under Schedule II an appellate Court has, in exercise of the powers conferred upon it under section 107, the power to refer matters to arbitration. The words 'any other enactment' in section 8 must, in our opinion, include the nonrepealed part of the former enactment. The word 'Code' in section 107 would therefore include a reference to the Arbitration Act which has incorporated the provisions of Schedule II of the Civil Procedure Code. This would become apparent if the word 'Code' in section 107 was amplified and in its place the following words were written: 'the sections and schedules of the Code'. The repeal of Schedule II, and its re-enactment in the Arbitration Act, therefore, does not make any difference so far as the powers of the appellate Court under section 107 are concerned, because those powers will still refer to the provisions of the Arbitration Act which have taken the place of the second schedule". The instant decision accepts this view. Having regard to the conflicting pronouncements and the varying lines of reasoning adopted it is to be hoped that the question of the appellate Court's power to refer to arbitration will be settled early by the Supreme Court.

THAWARDAS PHERUMAL *v.* UNION OF INDIA, (1955) 2 M.L.J. (S.C.) 23.

This is an instructive decision in Arbitration Law, dealing with the power of a Court under section 16 (1) (*c*) of the Arbitration Act to remit an award for reconsideration where an error of law is apparent on the face of the award. The Supreme Court points out that an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable; that he is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law; and that if he does not he can be set right by the Court provided his error appears on the face of the award. The Supreme Court however adds that the arbitrator's decision will be final even on a question of law if the parties have chosen specifically to refer a question of law as a distinct and separate matter. In *Adams* v. *Great North of Scotland Railway*[1], Lord Halsbury observed: "And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court having come to the conclusion that the decision of the arbitrator was, in the sense in which they undrstood the words erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language the parties had agreed to accept the arbitrator's decision upon the question of law as well as his decision upon the facts. In the Court of Queen's Bench, thirty years ago, that decision was adopted as the law which would guide the Court in the decision of such questions." The same principle was stated with precision in In re *King & Duveen*[2] where Channel, J., observed: " It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside......but it is equally clear that if a specific question of law, is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator". The same distinction is recognised in the judgment of the Privy Council in *Attorney-General for Manitoba* v. *Kelly*[3], where Lord Parmoor stated: "Where a question of law has not been specifically referred to an umpire, but is material in the deicison of matters which have been referred to him, and he makes a mistake apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award ". The principles thus developed were approved in *Kelantan Government* v. *Duff Development Co.*[4] In that case, Lord Trevethin observed: " This is not ....a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own". The law on the matter was fully reviewed by the House of Lords in *F. R. Absalom Ltd.* v. *Great Western* (*London*) *Garden Village Society*[5]. In the course of his speech, Lord Warrington of Clyffe stated: "I have also again read the opinions expressed in this House in *Government of Kelantan* v. *Duff Development Co.*[4], and I think it is clear that this case decides that, in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. It recognises the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally as it is in the present case".[6] Similarly Lord Russel of Killowen said[7]: " It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision........The authorities make a clear distinctionbetween these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when an error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.". These principles equally apply in India. In *Durga Prasad Chamria* v. *Sewakshadas Bhattar*[1], the Judicial Committee held that where points of law have been specifically referred to an arbitrator and his award is alleged to be vitiated by his erroneous decision in regard to them, the Court would not interfere with the award even if the Court itself would have taken a different view of the points had they been before it. In the instant case, the Supreme Court has followed these principles and held that if no specific question of law is referred, either by agreement or by compulsion the decision of the arbitrator on that is not final however much it may be within his jurisdiction and indeed essential for him to decide that question incidentally.

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[1] L.R. (1891) A.C. 31, 39.
[2] L.R. (1913) 2 K.B. 32.
[3] L.R. (1922) 1 A.C. 268, 283 (P.C.).
[4] L.R. (1923) A.C. 395.
[5] L.R. (1933) A.C. 592.
[6] L.R. (1933) A.C. 592 at 602.
[7] *Ibid*, p. 607.

MURUGAN *v.* SIVARAMAN, (1955) 2 M.L.J. 638.

It is now fairly well settled that a person who applies for leave to institute a suit or file an appeal *in forma pauperis* must act with the utmost good faith and if it turns out that there was intentional non-disclosure of assets belonging to the petitioner that would be a ground for dimissing the application. In *Durga Prasad* v. *Srinivas*[2] it was found that the pauper had failed to disclose the value of the equity of redemption he had in a certain property and the value of certain other items of property. The explanation for the non-disclosure was that what had not been disclosed was worthless and of no value. The learned Judges held that, even assuming that this was true, the real question will be whether the pauper had discharged his duty to make a full and frank disclosure. Courtney Tyrrell, C.J., observed : " It is most important that all applications for leave to sue or prefer appeals *in forma pauperis* should set forth with the utmost good faith as in the disclosure of assets in insolvency proceedings, the whole of the assets of the applicant........If it should be revealed in the course of the hearing of the application that the applicant has not stated with utmost good faith the whole of his assets the application will be rejected at the very earliest stage." In *Mt. Chamela Kaur* v. *Pursottam Das*[3], the existence of certain items of movable property, namely, a couple of trunks and an almyrah had not been disclosed. It was also found that their non-disclosure was not an act of bad faith. In those circumstances the Court held that no case for dispaupering had been made out. The question has come up for examination in Madras in *Kuppuswami Naidu* v. *Varadappa Naidu*[4]. In that case it was pointedly argued that even if the particular asset alleged not to have been disclosed in the first instance had in fact been disclosed its value would not have affected the question of pauperism, and therefore, the non-dislcosure was immaterial. The argument was rejected and it was laid down that the relevant consideration will be whether there was any intentional departure from good faith. Chandrasekhara Ayyar, J., observed : "It was not a case of unintentional or accidental omission of assets.....The argument that even if the particular asset that has now come to light had been disclosed it would not affect the question of the alleged pauperism of the applicant does not take stock of the fact that the utmost *bona fides* is required of the petitioner in the matter of the disclosure of his or her assets and that any intentional departure from good faith whatever the motive might be, must attract the consequence of a dismissal of the petition, because under Order 33, rule 2 read with Order 35, rule 5 (*a*) it is the bounden duty of the petitioner to make a full and accurate verified statement about his properties." In *Chellammal* v. *Muthulakshmi Ammal*[5] after the grant of leave to appeal *in forma pauperis*, an application was filed to revoke the leave granted, on the ground that the existence of certain assets had been suppressed. It was found that the appellant was entitled to a house which however, was under a mortgage to a Co-operative Society. The reason given for the failure to disclose the item was that the appellant had only a life interest in it and that such interest had practically little value. It was held that inasmuch as under Order 33, rule 2, read with Order 33, rule 45 (*a*) of the Civil Procedure Code, it was the bounden duty of the petitioner to make a full and accurate verified statement of his properties, where it

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1. (1949) 2 M.L.J. 760 (P.C.).
2. A.I.R. 1930 Pat. 368.
3. A.I.R. 1932 Pat. 308.
4. (1942) 2 M.L.J. 345.
5. (1945) 1 M.L.J. 53.

is found that leave to appeal as pauper was obtained by a person without disclosing his interest in the equity of redemption in some immovable property such person must be dispaupered. It was also held that there having been a fraud on the Court the question whether the equity of redemption was substantial or of little value will be beside the point. The test thus will be whether the non-disclosure was inadvertent or deliberate. If it was deliberate the value of the item is irrelevant. Leach, C.J., observed : " It follows that she obtained an order from the Court without disclosing material facts. In fact her action amounted to a fraud on the Court. The son says that the equity of redemption is of no value; but we are certainly not prepared to accept his word for this. As was pointed out in *Kuppuswami Naidu* v. *Varadappa Naidu*[1], the utmost good faith is required of the petitioner in the matter of the disclosure of his or her assets and any intentional departure from good faith whatever the motive may be must result in the dismissal of the petition." The emphasis is upon the need for utmost good faith. Where good faith is negatived, the reason or motive behind the non-disclosure will be hardly relevant. In *Ramakrishna Chetti* v. *Govindammal*[2], leave to sue as a pauper had been refused on the ground of failure to dislose the existence of a provident fund standing in the name of the petitioner. The petitioner's explanation for such failure was that he was genuinely under the impression that it belonged to his dependants and not to himself. The High Court found that the non-disclosure was not *mala fide*. Venkatarama Ayyar, J., observed : " But the question is not whether the petitioner had some sort of title to the provident fund, but whether having regard to its incidents he had reason to believe and actually did believe that it was not an asset available to him. There are no grounds whatever for rejecting his explanation and it must be held that in omitting to disclose the provident fund, the petitioner acted *bona fide*". This statement amounts to saying that where in fact there is omission the motive for the omission may be looked into and the duty of disclosure with the utmost good faith will not be in any way infringed if the motive was innocent. In that view, the learned Judge held that permission to sue as a pauper should be refused only if the suppression is deliberate and that to extend the rule to all cases of omissions even when they are due to inadvertence or mistake would result in grave injustice, and no warrant can be found for it in the provisions of the Civil Procedure Code. Innocent non-disclosure cannot be presumed merely because the items not revealed are of little value. In the instant case, the lower Court had found that the petitioner was guilty of fraudulent suppression of one of his assets, namely, two bulls worth about Rs. 120. Rajamannar, C.J., having accepted that finding as binding on him in revision went on to say: "To find out whether an omission was deliberate and *mala fide*, one test is to ascertain whether the intention was to conceal the omitted item, because if that were included, the Court would find that the petitioner had the means to pay the Court-fee". The validity of the argument founded on this last consideration seems to be debatable in view of the observation in *Kuppuswami Naidu's case*[1], that where an intentional departure from good faith is proved the motive underlying it is irrelevant. In the Patna case, *Durga Prasad* v. *Srinivas*[3], also Courtney Tyrrell, C.J., seems to have thought that what was required was a full disclosure and the fact that the items that came to light subsequently were worthless was hardly relevant. Whether the omission was intentional should be shown by evidence *aliunde* and not by a reference to the value of the items not disclosed. Inadvertence or mistake will negative intention but not necessarily the low value of the property not revealed. If the instant decision intends to lay down that where the value of the properties brought to light is such that even if mentioned it would not establish the possession of means to pay the Court-fee, the non-disclosure has no effect, it will be going beyond what is warranted by the language of the earlier decisions.

THE STATE OF MADRAS *v.* THE MADRAS ELECTRIC TRAMWAYS, (1955) 2 M.L.J. 640.

This is an important decision on a question of Company Law. It holds *inter alia* that there is nothing in section 162 or section 166 of the Companies Act, 1913, to

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1. (1942) 2 M.L.J. 345.
2. (1954) 1 M.L.J. 26.
3. A.I.R. 1930 Pat. 368.

render incompetent a petition by the directors of a company incorporated outside India which had been carrying on businss in India and had ceased to do so, on behalf of the company, for being wound up in India. It is settled law that a foreign company doing business in India can be wound up as an unregistered company. Part IX of the Act deals with the winding up of unregisterd companies. Section 271 (3) provides that where a company incorporated outside India which carries on business in India ceases to carry on business in India it may be wound up as an unregistered company under Part IX even if it has been dissolved or otherwise ceased to exist under or by virtue of any laws of the company under which it was incorporated. Section 276 lays down that the provisions of Part IX in regard to unregistered companies shall be in addition to and not in restriction of any provisions in the Act with respect to the winding up of companies by the Court. Section 271 (1) in clause (iii) details the circumstances in which an unregistered company may be wound up. Section 166 provides that an application to the Court for the winding up of a company can be presented either by the company or by any creditor or contributory. This section applies to unregistered companies as well, and thus it would follow that a foreign company as an unregistered company can file a petition for winding up. Section 162 states that a company may be wound up by the Court (i) if the company has by special resolution resolved that the company be wound up by the Court, (ii) if default is made in filing the statutory report or in holding the statutory meeting, (iii) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year, (iv) if the number of members is reduced in the case of a private company below two or in the case of any other company below seven, (v) if the company is unable to pay its debts, (vi) if the Court is of the opinion that it is just and equitable that the company be wound up. The question is whether in view of these provisions there can be a petition for the winding up by the Court filed by the directors on behalf of the company without a special resolution of the shareholders. Two reasons have been suggested against the maintainability of such a petition. One is that the term 'company' can only mean the company composed of all its members and not the directors. The other reason is that the duty of the directors is to manage the company and management cannot include the stoppage of the work of the company. In In re *Patiala Banaspati, etc., Co.*[1] the first of these grounds was relied upon in holding that a petition for winding up cannot be presented by the directors on behalf of the Company. Passey, J., observed: "According to section 166 of the Companies Act, a petition for compulsory winding up can be presented by the company by any present, contingent or prospective creditor, by any contributory or contributories or by all or any of these parties together or separately, or by the registrar. The section attaches some conditions subject to which the contributories, the Registrar, and the contingent and prospective creditors can apply....Sections 166 and 162 (*c*) (1) should be read together and if they are so read, there can be little doubt that it is the company that can apply for compulsory winding up, and in that case the company can be wound up only when its members assembled in a general body meeting decide to present a petition for winding up by the Court. If the petition is to be by the company it must have behind it the decision of the general meeting. Section 162 clause (1) says that a company may be wound up by the Court if the company has by a special resolution resolved that it be wound up by the Court. The Managing director or for that matter any number of directors cannot constitute the company for the purposes of making an application for winding up. It may be that the directors in case they find the company to be insolvent or unable to pay its debts or in case there is any other urgent or important matter affecting the company which requires an investigation by the Court would be justified in applying to the Court for compulsory winding up, but if they make such an obligation they would be doing so in their individual capacity and not in the name of the company....The company means the company as composed of all its members and for a matter as grave as compulsory winding up, their views must be consulted and expressed by a resolution adopted at a general meeting. It is true that the Managing Director does under the Articles of Association possess the power to institute or defend suits or other litigations on behalf of the company. But that power in my opinion does not include the power to make an application for winding up in the name of the company, as it is the company itself which will decide whether to apply for compulsory winding up or not." In *In re Galway & Salthill Tramways Co*[1]., O'Connor M.R., held that the directors as such have no power to present the petition in the name of the company that the powers of the directors are only powers to manage, that the object of managing is the working of the concern whereas the object of a winding up is stoppage, and therefore the power to manage will not include the power to bring about the stoppage of functioning. The English practice seems to permit of such petitions by the directors on behalf of the company for the winding up of the company. It is stated by Palmer: "When the company gets into great difficulties, the directors acting on the company's behalf occasionally present a petition for winding up but such petitions are rare. It has ben held in an Irish case that the directors cannot present the petition without authority of a general meeting. This decision, however, is not followed in England, and many orders have been made on petitions presented by the directors without the sanction of a general meeting.[2] In the instant case the English practice is preferred and it is held that the directors can present a petition on behalf of the company for its being wound up.

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[1] A.I.R. 1953 Pepsu 195.

RAJ KALI KUER *v.* RAM RATTAN PANDEY, (1955) 2 M.L.J. (S.C.) 49.

This case deals with an extremely interesting question, namely, whether a priestly office like that of a pujari or panda can be inherited by a female. *Prima facie* it will depend on the nature of the services attached to the office, the character of the temple whether private or public, and whether the idol has been installed and consecrated sastraically or not. It is now fairly well settled that religious offices can be hereditary and that the right to such an office is in the nature of property under the Hindu Law. It has been so held in regard to the shebaitship in a temple, *Manohar* v. *Bhupendra*[3], *Ganesh* v *Lal Behary*[4], *Bhabatarini* v. *Ashalata Debi*[5]. In *Angurbala Mullick* v. *Debabrate Mullick*[6], the Suprem Court recognised that in the concept of shebaitship both the elements of office and property, of duties and pesonal interest are blended together and neither of the elements can be detached from the other, and though the position was in some respects anomalous it was an anomaly to be accepted as having been admitted into the Hindu law from an early date. In *Commissioner of Hindu Religious Endowments, Madras* v. *Sirur Mutt*[7], this view was affirmed and extended to the case of a mahant. The Supreme Cort held that what was said in the earlier case in respect to the shebaiti right could, with equal propriety, be applicable to the office of a Mahant that in the conception of mahantship as in shebaitship both the elements of office and property or duties and personal interest are blended together ; and neither can be detached from the other. It was, at the same time recognised that the mahantship is not heritable like ordinary property, but that is because of its peculiar nature and the fact that the office is generally held by an ascetic, whose connection with the natural family being completely cut off the ordinary rules of succession do not apply. It has further been held by decisions that in respect of such offices, where they are attached to public institutions, the duties are to be regarded as primary and that the rights and emoluments are only appurtenant to such duties, *Nagendra* v. *Rabindra*[8]. In regard to the office of pujari, the analogy of shebaitship suggests that where emoluments are attached to the office it is to be regarded as property. In fact in a number of cases the office of shebait has combined in itself the priestly office of the pujari of an idol with the secular office of the managment of the temple. As early as *Mitta Kunth Audhicarry* v. *Neerunjun Audicarry*[9], it was held that a hereditary priestly office in a family is partible property. The question then is whether there is anything in the office of pujari incompatible with the exercise of it by a female. Apropos of Muslim religious offices, in *Shahar Bano* v. *Aga Mahomed Jaffer*[10], the Judicial Committee approved the statement of the High Court that "there is no legal prohibition against a woman holding a mutawalliship when the trust, by its nature involves no spiritual duties such as a woman could not properly discharge in person or by deputy ". The duties of a pujari are to perform the daily worship of the image as well as the special worship of a periodical nature on particular occasions and for special festivals. Such services involve acts requiring the personal touch of the idol and the recitation in the case of sastraically installed idols of hymns including vedic hymns. It is also generally accepted that according to the sastras the functions of a pujari can be performed only by certain limited classes and require special qualifications. From very early times the incapacity of woman to recite vedic texts to offer sacrificial fire, or to perform sacramental rights had been postulated.[1] Possibly on account of that, a woman's incapacity to discharge in *person* the duties of a pujari had also become rcognised. The question therefore reduces itself to this, namely, whether she is also incompetent to get the duties discharged by employing a qualified substitute. On principle, a priest is chosen only with reference to his personal qualities and competence. As a matter of inevitable necessity, however, due to the theory of pollution by reason of births and deaths, the discharge of the functions of the office of a pujari has crept in and has developed gradually into a practice. There was also the feeling that the performance of the duties of an archaka or pujari is sinful and this factor was probably responsible for inducements by way of grants of land or promises of perquisites to attract suitable persons to the office. As remarked in the instant case, "this, in course of time and with the change in social conditions and economic values rendered the offices of panda and pujari in almost all the famous shrines in India a lucrative affair and has enabled the hereditary priests to get the functions discharged by paid substitutes and themselves enjoy a substantial margin of income." Thus the real point to be considered is whether a female is to be excluded from succession to the office by reason of her personal disability to perform the spiritual duties and to be denied the capacity to retain the property by getting the duties of the office discharged through a competent substitute. Sadasiva Ayyar, J., was of the view that it is not open to a woman to employ a proxy, *Sundrambal Ammal* v. *Yogavanagurukkal*[2]. The trend of decisions in Madras has however been the other way. In *Seshu Amma* v. *Sundararaja Aiyar*[3], it is stated that according to the Pandits though a woman cannot succed to the office of *acharyapurusha*, religious offices like those of an archaka or pujari can be held by a female and the duties discharged by employing a proxy. In *Ramasundaram Pillai* v. *Saundarath Ammal*[4], the Court observed : "It is undeniable that this and other High Courts have in numerous cases acted on the assumption that women could hold religious offices and get the duties performed by proxy ". Likewise in *Rajeswari Ammal* v. *Subramania Archaka*[5], the learned Judges said : "We are of the opinion that a female is not under Hindu law or custom disqualified from succeeding to a hereditary religious office and getting such duties as she may be disqualified by reason of her sex from performing, performed by a proxy ". The Full Bench ruling in *Annaya Tantri* v. *Ammaka Hengsu*[6], has accepted this view. In other High Courts also, more or less the same view has been taken, see *Keshavbhat bin Ganeshbhat* v. *Bhagirhibhai kam Narayanbhai*[7], *Radha Mohun Mundul* v. *Jadoomonee Dassi*[8], *Mahamaya* v. *Haridas.*[9] In view of the long catena of decisions, the Supreme Court has, in the instant case, reached the conclusion that a careful review of the reported cases on this matter shows that the usage of a female succeeding to a priestly office, and getting the same performed through a competent deputy is one that has been fairly well recognised and there is nothing in the Hindu textual law to the contrary. The Supreme Court further points out that this being the rule regarding public temples where the idol has been installed and consecrated sastraically, in the case of private temples, as well as in the cases where the idol has not been sastraically consecrated the right of a woman to hold the office and get the religious duties incidental to it performed through a deputy is much stronger and cannot be challenged.

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[1] (1918) 1 Ir. R. 62.

[2] Palmer's Company Precedents, 16th edition, Part II, 1952. *See also* Palmer's Company Law, 19th edition.

[3] A.I R. 1932 Cal. 791 (F.B.).

[4] (1936) 71 M.LJ. 740 : L.R. 63 I.A. 448 (P.C.).

[5] (1943) L.R. 70 I.A. 37 : (1943) 2 M.L.J. 70 (P.C.).

[6] (1951) S.C.J. 394.

[7] (1954) S.C J. 335: (1954) 1 M.L.J. 596 (S.C).

[8] A.I.R. 1926 Cal. 490, 495, 496.

[9] (1875) 14 Beng.L.R. 166.

[10] (1904) 17 M.L.J. 52 : L.R. 34 I.A. 46, 53 (P.C.).

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[1] S.B.E. Series, Manu, IX, 18 : XI, 36.

[2] (1914) 26 M.L.J. 315 : I.L.R. 38 Mad. 350.

[3] (1853) Mad.S.D.A. 261.

[4] A.I.R. 1915 Mad. 725.

[5] (1915) 30 M.L.J. 222: I.L.R. 40 Mad. 105.

[6] (1918) 35 M.L.J. 196 : I.L.R. 41 Mad. 896.

[7] (1866) 3 Bom.H.C.R. A.C J 75.

[8] (1875) 22 W.R. 369.

[9] (1914) I.L.R. 42 Cal. 455.

THE PUBLIC PROSECUTOR *v.* KANNIAPPAN, (1955) 2 M.L.J. 651.

This decision lays down a wholesome practice point. It is elementary law that punishment awarded in a criminal case takes note of various factors, such as, the magnitude of the offence, the consequences of the act, and the character of the offender. One thing is, however, clear. If a particular form of punishment is prescribed by law for an offence the Court in awarding sentence should comply with the spirit of the requirement and not with its form merely. In the instant case, it is pointed out that under section 330 of the Penal Code a term of imprisonment is obligatory, which normally means that the offender should be sent to gaol, and therefore to impose a sentence of imprisonment till the rising of the Court will amount to evasion of the statutory provision, and that such an evasion will be justified only in very exceptional circumstances, as for instance, when the offence is found to be severely technical or where there are extenuating circumstances possessing unusual force. Otherwise it will be to "betray weakness and sloppy sentimentalism".

BOOLOGAM NAIDU *v.* JAGANNATH, (1955) 2 M.L.J. 680.

This decision holds that a suit by the purchaser of the interest of a member of a joint Hindu family in Court auction filed within twelve years from the date when the sale became absolute will be in time under Article 138 of the Limitation Act. The purchaser from a Mitakshara coparcener is not a tenant-in-common with the other members of the family and is not entitled to joint possession or to mesne profits from the date of the alienation. A recent assessment of his position is found in *Siddeswar Mukherjee* v. *Bhubaneswar Prasad Narain Singh*[1], where the Supreme Court observed: "All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title in any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion this is the right view to take and Mr. Daphtary who appeared in support of the appeals could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase". In *Shevantibai* v. *Janardhan*[2], the Bombay High Court felt that inasmuch as the alienee from an undivided coparcener is not entitled to possession it cannot be said that the possession of any person is adverse to that of a person who is not entitled to possession at all, and therefore, Article 127 of the Limitation Act cannot apply as it relates only to a case where the exclusion becomes known to the plaintiff as a member of the coparcenary and not to the purchaser from such member. The learned Judges thought that Articles 136, 137 and 138 also were inapplicable and therefore the case fell within the residuary Article, Article 120. The application of Articles 136 to 138 has been explained by Ranade, J., in *Gopal* v. *Krishna*[3], as follows: "Article 136 applies to a private purchaser from a person not in possession. Article 137 applies to an auction purchaser of the rights of a person not in possession. Article 138 applies where the auction purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale". In the last case Article 138 prescribes the period of twelve years from the date when the sale becomes absolute, *Tincourie Mazumdar* v. *Sri Kishen Chand*[4]. The question would still remain as to what 'possession' in the context of the Article signifies and whether the joint possession of a coparcener in the family properties will be 'possession' within the meaning of Article 138. In the context of Article 136 it has been recognised that 'possession' includes possession which a member of a joint Hindu family is presumed to have in the family property unless excluded therefrom, *Bhogavalli Venkayya* v. *Bhogavalli Ramakrishnamma*[5], *Saw En Hoke* v. *Ma Po Yin*[6]. If for purposes of Article 136 the joint possession in the undivided family properties held by a coparcener will suffice there is no reason for construing the term 'possession' differently in regard to Articles 137 and 138, there being nothing in the context to suggest a different meaning. This construction receives support in some measure from the observations of Best, J., in *Arumuga* v. *Chockalingam*[1]. Thus possession in Article 138 is not confined to possession exclusively held but will include possession jointly held by the members of a Mitakshara undivided family.

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[1] (1953) S.C.J. 700 : (1953) 2 M.L.J. 789 (S.C.).

[2] A.I.R. 1939 Bom. 322.

[3] (1900) I.L.R. 25 Bom. 275.

[4] 59 Cal.W.N. 220 : A.I.R. 1955 Cal. 369.

[5] (1911) 9 Ind. Cas. 495.

[6] A.I.R. 1923 Rang. 223, 224.

SITARAMA RAO *v.* VENKATARAMA REDDIAR, (1956) 1 M.L.J. 5 (F.B.).

This is a somewhat difficult decision to follow. It is now well settled that in this country a minor's contract is void, *Mohori Bibi* v. *Dhurmadoss Ghose*[2]. It is a different question as to how far a guardian can by his acts and transactions bind a minor. The decision under review deals with the question of specific performance of executory contracts entered into by a guardian on behalf of a minor for the sale or purchase of property. The impact of various factors such as the nature of the property affected, whether it is the minor's interest in undivided joint family property or whether it is his separate property, the nature of the particular transaction whether it is a dealing with property or is a contract of loan or other similar obligation, the character of the contract, whether executory or executed, etc., has fallen to be considered. It is noteworthy that the matter was reviewed recently by a Full Bench of the Andhra High Court as well in *Suryaprakasam* v. *Gangaraju*[3]. The instant decision holds that where the minor is a member of a joint Hindu family and the transaction is by the manager on behalf of the family and for purposes of benefit or necessity of the family the transaction can be specifically enforced even against the minor's interest; that where the contract was one by a guardian concerning the separate property of a minor it cannot be specifically enforced by or against the minor for want of mutuality; but if the agreement related to a sale of the minor's property partly performed the matter will stand on the same footing as a completed sale; and that the guardian of a minor is not at liberty to enter into an agreement for the purchase of property on behalf of a minor and such a contract cannot be enforced by the minor on his attaining majority. The decision of the Full Bench of the Andhra High Court holds that it makes no difference whether the agreement is one for the sale or for the purchase of property, or whether the property sought to be affected is the minor's separate property or interest in undivided joint family property, and that in every case the deciding factor is whether the contract is within the competency of the guardian within the scope of his power under the Hindu Law. At the present time in regard to Hindus the matter is wholly regulated by the Hindu Minority and Guardianship Act, 1956. If the guardian is a natural or testamentary guardian the provisions of section 8 will apply and the guardian can *in no case* bind the minor by a personal covenant. It may be that the precise scope of this provision may have to be judicially elucidated. If the guardian is a Court guardian the competency of his acts will be judged by the provisions of the Guardians and Wards Act of 1890. Be that as it may, since the Hindu Minority and Guardianship Act may not affect transactions or contracts already entered into prior to the Act by a guardian on behalf of a Hindu minor the competency of the guardian to bind the minor will have to be assessed in the light of the earlier law. In *Hanuman Persaud's case*[4], it was laid down by the Judicial Committee that the power of the manager or guardian of a minor's estate was a limited and qualified power and can be exercised rightly only in a case of need or benefit to the minor's estate. The observations in the judgment make it clear that no distinction is to be made in the application of the test whether the challenged transaction was by way of alienation of property or by way of a loan. Ever since that decision it has been the undoubted law that the acts of a guardian standing up to the test formulated there will be binding on the minor. It is also useful to remember that references in the case of a minor to his personal liability signify nothing more than the liability of his estate, see *Annamalai* v. *Muthuswami*[1]. In *Waghela Rajsanji* v. *Shekh Masludin*[2], it was expressly ruled that a guardian cannot contract in the name of the ward so as to impose on him a personal liability. The contract in that case had sought to bind the guardian as well as the minor by a duty to indemnify the purchaser of the minor's property in a certain contingency. The Judicial Committee observed : "Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward that so far as this suit is founded on the personal liability of the talukdar it must fail ". The doctrine so postulated has to be read along with what had been stated in the earlier Privy Council decision. So read together it would signify that it is only when the personal covenant entered into by the guardian on behalf of a Hindu minor fails to satisfy the test of need or benefit of the estate that it will not bind the minor. Apropos of the observations in *Waghela Rajsanji's case,*[2] in the Full Bench decision of the Madras High Court in *Patchu Ram Jogayya* v. *Vajjula Jagannadham*[3], Seshagiri Ayyar, J., observed : "I do not think that it was intended to lay down by this statement that no rule to the contrary under the Hindu Law would be countenanced. The term Indian Law was meant to apply to the statute law of the land and not to Hindu or Muhammadan Law. I am therefore of opinion that the rule laid down in *Waghela Rajsanji* v. *Shekh Masludin*[2], was not intended to affect the Hindu Law liability of the minor. I would therefore answer the question under reference by saying that no decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject". Whether such an interpretation of *Waghela Rajsanji's case*[2] would be justified has been doubted in a number of decisions in view of certain observations of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mohammed*[4]. In that case the guardian or manager of the minor had entered into a contract on behalf of the minor for the purchase of certain immovable property. It was assumed that the contract was for the minor's benefit. Nevertheless it was held that the minor on attaining majority could not specifically enforce it. In the course of his judgment Lord Macnaghten stated : "They are, however, of opinion that it is not within the competency of a manager of a minor's estate or within the competency of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract ". This ruling has been followed and applied in a catena of decisions in different High Courts, and suits for specific performance of contracts for sale or purchase filed at the instance of either party were dismissed by the Courts on the ground of want of mutuality. *Mir Sarwarjan's case*[4] was a case where the parties were Muslims. The guardian whose act was in question was a *de facto* guardian. There was no finding that the contract was at least for the benefit of the minor. The statement of the law applicable to the dealings of a Hindu guardian on behalf of a minor made in *Hanuman Persaud's case*[5], was not noticed. These considerations apart, it is debatable whether the importation of the doctrine of mutuality as applicable in India was justified. It is true that under the English law an infant cannot sustain a suit for specific performance on the ground of want of mutuality, and such multuality is to be judged of at

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[1] (1892) I.L.R. 15 Mad. 331, 332.

[2] (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 39 (P.C.).

[3] (1955) Andh. W.R. 818 (F.B.).

[4] (1856) 6 M.I.A. 393 (P.C.).

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1. I.L.R. (1939) Mad. 891 : (1939) 1 M.L.J 185 (F.B.).
2. (1887) I.L.R. 11 Bom. 551 : L.R. 14 I.A. 89 (P.C.).
3. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 792.
4. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
5. (1856) 6 M.I.A. 393 (P.C.).

the time the contract is entered into. The doctrine of mutuality had crept into English Law not so much from a conviction of its utility as from a desire for symmetry. It was at best a conventional rule and did not rest on any logical or fundamental principle. It was stated by Knight Bruce, V.C. in *Salisbury* v. *Hatcher*[1]: "In cases of specific performance the want of mutuality is a consideration generally material but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of equity into action. There are cases in which plaintiffs have had a decree for specific performance against the defendants who when the bill was filed were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is a matter of judicial discretion ". English law has in fact recognised many exceptions to the doctrine of mutuality. It is not for instance applied in the case of conditional contracts, or unilateral contracts, or transfers with incidental covenants. It was not adopted in India in regard to the Specific Relief Act[2]. In this country the principle is followed generally that specific performance cannot be granted of a contract which can be enforced at the option of only one of the parties[3]. In *Subramaniam* v. *Subba Rao*[4], a contract to sell immovable property had been made by a mother as guardian of her minor son. The sale was for discharging debts incurred by the deceased father of the minor. The contract was in writing. The purchaser had been given possession of the lands forming the subject-matter of the contemplated sale. A registered document of sale had, however, not been executed. The minor represented by his mother filed a suit claiming possession of the land contracted to be sold. The purchaser invoked the protection afforded by section 53-A of the Transfer of Property Act on the basis of part-performance. Under that section, when there has been part-performance, the transferor is debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession other than a right expressly provided by the contract. The question thus fell to be considered as to who was the transferor in the circumstances of the case. The Judicial Committee held that the act was one within the competency of the guardian of a minor in Hindu law; that therefore the act of the guardian was the act of the minor; and the minor himself was to be regarded as the transferor within the meaning of section 53-A of the Transfer of Property Act. The Privy Council observed: "Their Lordships entertained no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29th November, 1935, on behalf of the respondent for the purpose of discharging his father's debts and that, if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law". Lord Morton who delivered the judgment of the Board after quoting the observations in *Hanuman Persaud's case*[5], "they consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself or others gave to her" went on to state. "Thus the act of the mother and guardian in entering into the contract of sale in the present case was an act done on behalf of the minor appellant". The Judicial Committee also quoted the statement in Pollock and Mulla's Indian Contract and Specific Relief Acts[6]: "A minor's agreement being now decided to be void it is clear that there is no agreement to be specifically enforced . . ." It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts in India in cases which arose subsequent to the governing decision of the Privy Council in *Mohori Bibi's case*[7], that the contract can be specifically enforced by or against the minor if the contract is one which is within the competency of the guardian to enter into on his behalf so as to bind him by it;

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[1] (1844) Y. & C.C.C. 54.

[2] Whitley Stokes, Anglo-Indian Codes, Vol. I, p. 931.

[3] Pollock & Mulla, Indian Contract and Specific Relief Acts, 7th Edn., p. 695.

[4] (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).

[5] (1856) 6 M.I.A. 393 (P.C.).

[6] 7th Edition, p. 70.

[7] (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.).

and, further, it is for the benefit of the minor. But if either of these two conditions is wanting the contract cannot be specifically enforced at all". It is clear that the position so set out has been accepted by the Privy Council as a correct enunciation of the law. This is apparent from Lord Morton's observations : "In the present case, neither of the two conditions mentioned is wanting, having regard to the findings in the Courts in India. It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property, of which the respondent and not his mother was the owner. If an action had been brought for the specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother". The reasoning of Lord Morton leaves no room for doubt. It is clear that so long as the guardian functions within the scope of the doctrine of need or benefit of the estate, the Hindu minor will be bound by his acts. The act of the guardian is to be regarded as the act of the minor himself. The statements of law contained in *Waghela Rajsanji's case*[1], or *Mir Sarwarjan's case*[2], have to be understood in the light of what had been laid down in *Hanuman Persaud's case*[3], as the rule of Hindu Law. In that view it matters little whether the guardian's contract is one for sale or purchase or reconveyance. That it has been the one rather than the other in any particular decision of the Privy Council is only an accidental circumstance and not material. Nor will any distinction be justified between an executed contract and an executory contract of the guardian in regard to its binding character on the minor. The line of approach adopted in the judgment of the Andhra High Court steers clear of all complications which have been allowed to beset the law and is more satisfying than that adopted by the learned Judges of the Full Bench in the instant case.

CHATTANATHA KARAYALAR *v.* RAMACHANDRA IYER, (1956) 1 M.L.J. (S.C.) 1.

Under the Mitakshara Law nice shades of distinction exist according as a person is an ordinary coparcener, a manager or father. A coparcener, for instance, in the theory of that law cannot bind the other members by his acts. The manager is *prima primus inter pares* and represents the family in its dealings with the outside world. He can by his acts bind the other members so long as he functions within the scope of the doctrine of legal necessity or benefit of the estate. A father has larger powers. He can impose a partition on his sons and he can alienate joint family property for payment of his antecedent debts incurred for a purpose which is neither illegal nor immoral. Apart from such distinctions law does not recognise any essential difference in the status of joint family members. In the instant case the Supreme Court affirms that under the Hindu Law there is no presumption that a business standing in the name of any member is a joint family business. It is well settled that a joint family business is a form of property. An interest therein devolves in the same way as other property. If a Hindu starts a new business, he may do so as his own private venture in which case it will remain his separate property. On the other hand if a new business is started jointly by all the coparceners with the aid of joint family property or possibly without it, the business may itself become joint family property even though it is new. In *K. L. S. V. E. Annamalai Chetti* v. *K. L. S. V. E. Subramanian Chetti*[4], Lord Buckmaster observed : "A member of a joint and undivided family can make separate acquisition of property for his own benefit, and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate they remain free and separate". This statement constitutes a clear recognition of the principle that there is no presumption that a business standing in the name of a member of a joint family is joint family business. The position is made even clearer by the observations of the

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1. (1887) I.L.R. 11 Bom. 551 : L.R. 14 I.A. 89 (P.C.).
2. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
3. (1856) 6 M.I.A. 393 (P.C.).
4. (1928) 56 M.L.J. 435 (P.C.).

Judicial Committee in *Bhuru Mal* v. *Jagannath*[1], where it is stated : "Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business". The question will still remain whether it will make any difference if the business stood in the name of the joint family manager or the father. In *Benares Bank* v. *Hari Narayan*[2], it was pointed out that in regard to the starting of a new business and imposing on the minor members of the family the risks and liabilities of such business it would make no difference even if the manager who started the business was the father. The instant decision marks an advance on the law as settled earlier in the sense that, while recognising it as true that in regard to a newly started trade there is a difference between the position of a father and that of a manager in so far as the debts contracted by the former would be binding on the sons on the theory of pious obligation those incurred by a manager would not be binding on the members unless there was any necessity for the starting of the business, it holds that in regard to the ownership of a business standing in the name of a member of a joint and undivided Hindu family there is no presumption that it is a joint family business even if the coparcener happens to be the manager or the father.

BED RAJ *v.* STATE OF UTTAR PRADESH, (1956) 1 M.L.J. (S.C.) 28.

This decision deals with what is essentially a point of practice concerning the administration of criminal law. It points out that though there is no limitation on the High Court's power to enhance a sentence it is to be remembered that a question of sentence is a matter of discretion of the trial Court ; that where it has been exercised properly the appellate Court should not interfere to the detriment of the accused except for very strong reasons ; that there should be ordinarily no interference when the sentence passed imposes substantial imprisonment ; and that interference will be called for only when it is manifestly inadequate. In *Adamji Umar Dalal* v. *The State of Bombay*[3], Mahajan, J., observed : "The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the Court has to bear in mind the necessity of proportion between an offence and the penalty". And in *Dalip Singh* v. *The State of Punjab*[4], the Supreme Court once again returned to the question and stated : "On the question of sentence, it would have been necessary for us to intefere in any event because a question of principle is involved. In a case of murder, the death sentence should ordinarily be imposed unless the trying Judge for reasons which should normally be recorded considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly found an appellate Court will not interfere. The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate Court to say or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate Court but to the trial Judge and the only ground on which an appellate Court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty". The Supreme Court concludes by pointing out that for the High Court merely to state that accepting the revision petitions the sentences are changed from transportation to death would not justify the enhancement, that it is not a proper way to interfere with a judicial discretion exercised by the trial Court when a question of enhancement is concerned. The

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1. (1945) 1 M.L.J. 70, 73 (P.C.).
2. (1932) I.L.R. 54 All. 564 : L.R. 59 I.A. 300 (P.C.).
3. (1951) S.C.J. 820.
4. (1953) S.C.J. 532.

decision in the instant case reiterates these principles and throws into focus the grounds on which alone enhancement of sentence should be made.

TOPAN DAS *v.* THE STATE OF BOMBAY, (1956) 1 M.L.J. 60 (S.C.) AND BIMBADHAR PRADHAN *v.* THE STATE OF ORISSA, (1956) 2 M.L.J. 13.

The gist of the crime of conspiracy is that two or more persons do combine, confederate and agree together to carry out the object of the conspiracy. In Erle on Trade Unions, it is stated[1]: "With respect to the crimes classed under the term 'conspiracy' the external act of the crime is concert, by which mutual consent to a common purpose is exchanged". In England, from the time of 14 Hen. 4, it had been taken for granted that in cases in which there is an indictment for conspiracy under which two people are indicted and tried together either both men must be convicted or both must be acquitted. In such a charge it was considered that the jury must be satisfied as to each of them that conspired, and that if the jury was not satisfied as to the guilt of either of them both must be acquitted. This position was reached not so much as a matter of imperative law but as a matter of practice, *R.* v. *Manning*[2]. The rule was held to apply only where the conspiracy is alleged to be as between the accused who are charged and evidence has been let in on that basis. Even where the indictment is for conspiring with the accused and other persons unspecified, if the evidence let in is confined to the accused only the rule will operate. In *R.* v. *Thompson*[3], *A* was indicted for conspiring with *Y* and *Z* and other persons to the jurors unknown. The evidence was confined to *A*, *Y* and *Z*. The jury were of opinion that *A* conspired with either *Y* or *Z* but stated they could not find with which. *Y* and *Z* were thereupon acquitted. It was held that *A* also was entitled to be acquitted in those circumstances. The rule in England is thus set out in Chitty's Criminal Law[4]: "And it is holden that if all the defendants mentioned in the indictment except one are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid and no judgment can be passed upon him". This was so for the reason that as the record of conviction can only be made up in the terms of the indictment it would be inconsistent and contradictory to convict that one accused, *R.* v. *Plummer*[5]. In India section 120-A of the Penal Code which defines the offence of criminal conspiracy requires that two or more persons should agree to do or cause to be done an illegal act or an act which is not illegal by illegal means. The agreement itself in those circumstances becomes punishable, if it is to commit an offence. The gist of the offence under section 120-B being the agreement between the accused persons it is held that when one of the two accused is acquitted and discharged the other accused cannot be convicted of the charge. But at the same time it is recognised that, while the rule of English Law as to the acquittal of an alleged conspirator following from the acquittal of the other when the conspiracy was said to be only between the two and the trial was a joint trial of both is based upon a rule of practice and procedure of that country, namely, that repugnance or contradiction on face of the record will be a ground for annulling the conviction, in India there is no provision in the statutory law justifying an interference with conviction on the ground of repugnance in the record, though the Court may not shut its eyes to the inconsistency in convicting one person of the offence of conspiracy on the same evidence on which the other alleged conspirator had been acquitted, *Singleton* v. *Emperor*[6]. In the first of the instant cases four named persons had been charged with having committed the offence under section 120-B of the Indian Penal Code. There was no allegation nor was there any evidence forthcoming that any other persons were, though not placed on trial, concerned with the crime. Three of the four accused were acquitted. It was held that in the circumstances the conviction of the remaining man was not justified. In the second of the instant cases, on the findings of the lower Court, apart from the persons placed on trial, there were an approver who implicated himself equally with the other accused persons and a number of other prosecution witnesses who were alleged to be privy to the conspiracy. The evidence of the approver had been found by the lower Court to have been materially corroborated both as to the lawful agreement and as to the persons concerned with the conspiracy. On those facts the conviction of one of the five accused after an acquittal of the remaining four of them was held to be not improper. In the first instant case the result would be justified, even if in this country there is no rule of practice or procedure comparable with the rule in operation in England, altother as a matter of prudence ; and, in the second instant case the reasult is entirely in conformity with the earlier precedents on the matter.

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[1] Page 31.
[2] L.R. (1883) 12 Q.B.D. 241.
[3] (1851) 16 Q.B.D. 832 : 117 E.R. 1100.
[4] 2nd Edition, Vol. III, p. 1141.
[5] L.R. (1902) 2 K.B. 339.
[6] (1924) 29 Cal.W.N. 260.

ANANDA BEHARA *v.* STATE OF ORISSA, (1956) 1 M.L.J. 69 (S.C.).

The Transfer of Property Act does not define 'immovable property' except to say that it does not include "standing timber, growing crop or grass". Section 3, clause 26 of the General Clauses Act defines 'immovable property' as including 'benefits that arise out of land'. Whether any particular property is within the category of immovable property assumes importance for purposes of the formalities to be satisfied in case of a sale of such property. This question has recently come up in regard to the right to catch fish in specified sections of a lake over a specified period. In English Law such a right is treated as a *profit a prendre*. A *profit a prendre* is a right to enter the land of another person and appropriate some profit of the soil itself, *Manning* v. *Wasdale*[1]. The subject-matter may consist of animals including fowl and fish, *Wickham* v. *Hawker*[2], *Holdford* v. *Bailey*[3], *Ewart* v. *Graham*[4], *De la Warr* v. *Mills*[5], *Fitzgerald* v. *Firbank*[6], *Grove* v. *Portal*[7], *Fitzhardinge* v. *Purcell*[8]. A *profit a prendre* is an interest in land and any disposition of the same should be in writing[9]. In *Faidu Jhala* v. *Gour Mohan*[10], Pigot, J., observed : "I take it to be clear that a fishery *in alieno solo* is within the definition of 'immovable property' in the General Clauses Act ; the words in that definition "benefits to arise out of land" include such a fishery ; according to familiar legal language a fishery is a benefit arising out of land covered by water. In *Parbutty Nath Roy Chowdhury* v. *Mudho Paroe*[11], Garth, C.J., held that although a right to a jalkar may not involve any actual property in the soil over which the water flows, it is still an interest in immovable property within the meaning of Article 145 of the Limitation Act. In *Ram Gopal Bysack* v. *Nurumuddin*[12], the Court held that a right of fishery being a benefit arising out of land covered with water comes within the definition of "immovable property" in the General Clauses Act, and is therefore "immovable property" under section 106 of the Transfer of Property Act. In *Firm Chhotabbhai Jethabhai Patel* v. *Co.* v. *The State of Madhya Pradesh*[13], the Supreme Court held that a right to pluck, collect and carry away tendu leaves growing in forest does not give the owner of the right any proprietary interest in the land. Quoting the observations of the Judicial Committee in *Mohanlal Hargovind of Jubbulpore* v. *Commissioner of Income-tax, Central Provinces & Berar, Nagpur*[14]: "The contracts grant no interest in land and no interests in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which, of course, implies the right to appropriate them as their own property"— the Supreme Court held that the agreement to cut, gather, and carry away the tendu leaves was in essence and effect only a license, and will not make the owner of the right either a proprietor or a person having any interest in the proprietary right. The only kind of leaves affected are as suggested by the term 'pluck' the leaves that grow on the trees, which implies that there will be a fresh crop at periodical intervals, and that would make it a growing crop which is expressly exempted from the definition of immovable property in the Transfer of Property Act. A right of fishery is altogether different. As a benefit to arise out of land it is an interest in land, and as it is immovable property a transfer of such a right will require writing and registration because of section 54 of the Transfer of Property Act.

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[1] (1836) 5 Ad. & El. 758.
[2] (1840) 7 M. & W. 63.
[3] (1849) 13 Q.B. 429.
[4] (1859) 7 H.L.C. 331, 344.
[5] (1881) L.R. 17 Ch. D. 535.
[6] L.R. (1897) 2 Ch. 96.
[7] L.R. (1902) 1 Ch. 727.
[8] L.R. (1908) 2 Ch. 96.
[9] Halsbury's Laws of England, 2nd ed., Vol. 11, p. 387.
[10] (1892) I.L.R. 19 Cal. 544 (F.B.).
[11] (1878) I.L.R. 3 Cal. 276.
[12] (1892) I.L.R. 20 Cal. 446.
[13] (1953) S.C.J. 96.
[14] (1949) 2 M.L.J. 571 : L.R. 76 I.A. 235 : I.L.R. (1949) Nag. 892 (P.C.).

KARUPANNA GOUNDAN *v.* PONNUTHAYEE, (1956) I M.L.J. 190.

An application under Order 21, rule 90, of the Civil Procedure Code to set aside a sale can be made on the ground of material irregularity or fraud in publishing or conducting the sale. The application has to be filed within thirty days of the sale. The irregularity or fraud contemplated by the rule is *prima facie* one antecedent to the sale. At that stage the auction-purchaser cannot be in the picture at all unless the decree-holder himself becomes the purchaser and is guilty of fraud, in which case the application will fall within the purview of section 47 and not of Order 21, rule 90. Where a judgment-debtor is kept out of knowledge of the execution sale by the fraud of the decree-holder the question has frequently come up whether section 18 of the Limitation Act can be invoked to give an extension of time to an application to set aside a sale under Order 21, rule 90, of the Civil Procedure Code, in a case in which no allegation or proof of fraud is made or established against the auction-purchaser. Section 18 of the Limitation Act provides that where any person having a right to institute a suit or make an application has by means of fraud been kept from the knowledge of such right, the time limited for instituting a suit or making an application (*a*) against the person guilty of the fraud or accessary thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected. The auction-purchaser does not derive his title from the decree-holder and does not come within the purview of clause (*b*). Under clause (*a*), however, to qualify for extension of time, the application should be against the person guilty of the fraud or accessory thereto. Since the fraud contemplated is one antecedent to the sale and since the auction-purchaser cannot ordinarily be in the picture in regard to it, it looks as if section 18 cannot be invoked so as to prejudice the rights of the auction-purchaser. Two different views have been taken in regard to the question. According to *Mallikarjun* v. *Narhari*[1], "the policy of the Limitation Act is to protect *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside". Conformably to such policy it was thought by Sadasiva Ayyar, J., in *Payadamma* v. *Lakshminarasamma*[2], that an application to set aside the Court auction sale should be brought within thirty days of the sale even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale and that the judgment-debtor in such cases should be left to his remedy for damages caused to him by the decree-holder's fraud. In *Ghulam Kadir* v. *Municipal Council, Nagapattinam*[3], it is pointed out that under section 18 the application contemplated is as against the person guilty of the fraud or accessory thereto ; what has to be proved is not merely fraud which vitiates the sale but fraud which kept the applicant in ignorance of his right to make an application to set aside the sale ; and hence, unless the ignorance of the applicant of his right to file the application is established as due to the fraud of the auction-purchaser the section cannot apply. A different conclusion was reached in *Podila Venkanna* v. *Chinchinada Venkanna*[4], where it was said that though an application to set aside a sale is primarily an application against the decree-holder inasmuch as he is the initiator of the sale proceedings and the sale enures for his benefit, yet the person affected by the setting aside of the sale is not only the decree-holder but also the auction-purchaser as well, and both are necessary parties to the application and so section 18 can be invoked where fraud is proved to have been committed by the decree-holder or the auction-purchaser or both. In the Calcutta High Court, opinion on the question has not been uniform. In *Mahipati Haldar* v. *Atul Krishna*[1], as also in *Hira* v. *Asutosh*[2], it was held that in an application under Order 21, rule 90 of the Civil Procedure Code, to set aside the sale the aid of section 18 of the Limitation Act could be invoked even if the auction-purchaser was not shown to be guilty of the fraud. In the first of these cases Mukherjea, J., was influenced by the consideration that if it was necessary to prove the fraud of the auction-purchaser to get an extension under section 18 the judgment-debtor will have absolutely no remedy where by the fraud of the decree-holder he is totally kept out of the knowledge of the sale and the property is sold for a nominal sum but the auction-purchaser is not a party or accessory to the fraud. This view has not, however, been accepted in later decisions of the Calcutta High Court, see *Mihirlal* v. *Panchakari Santra*[3], *Majibar Rahman* v. *Rahu Bux*[4]. The decision under notice prefers the lenient to the strict view taken in regard to the scope and range of the benefit available under section 18 of the Limitation Act. With due respect, it may be pointed out that the stricter view seems to be the more justifiable view. If one of two innocent parties—the judgment-debtor and the auction-purchaser—has to suffer, the sufferer should be the person who provided the occasion or the opportunity for the commission of the fraud. Secondly, it is not as if the judgment-debtor is left destitute of any remedy whatsoever. He can sue the decree-holder for recovery of damages on the ground of fraud. Finally as was observed by Das, J., in *Mihirlal's case*[3], unless certain things are added to section 18 or certain words actually used in the section are ignored, the extension of time under section 18 cannot be made except where the auction-purchaser was himself guilty of the fraud or an accessory thereto. The enlargement of the scope of the section will be a matter not for the Court but for the legislature. As was observed by the Judicial Committee in another context : " The case may be a *casus omissus.* If it be so then it is for others than their Lordships to remedy the defect."

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[1] (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216 : I.L.R. 25 Bom. 337 (P.C.).

[2] (1914) 28 M.L.J. 525 : I.L.R. 38 Mad. 1076.

[3] (1950) 1 M.L.J. 432.

[4] (1950) 1 M.L.J. 471.

NALLAMBAL AMMAL *v.* RAJARATNAM PILLAI, (1956) 1 M.L.J. 245.

The point decided in this case may have lost much of its importance in view of the conferment of absolute rights in property acquired by a female whether before or after the passing of the Hindu Succession Act, 1956. Nevertheless the decision will be useful in assessing the rights of the alienee from a limited owner where the transfer has taken place prior to the passing of the Act. The decision is that if the circumstances of the case warrant, it will be perfectly legitimate for a Hindu widow to sell her husband's property for future maintenance if the property is small and does not yield enough for such maintenance. The decision reduces the matter, in effect, to the level of a question of fact instead of treating it as a matter of law. It is of interest to note that the question had in the past been sometimes considered to be purely a matter of law, namely, as a question of the competency of the widow to alienate property inherited from her husband for future maintenance. Thus in *Gyanu Kashibai* v. *Sarubai Biru*[5], Beaumont, C.J., observed : " I have been referred to no authority for the proposition that a widow can sell her husband's property to provide future maintenance and on *principle* I do not see how that can be done ". Similarly in *Ratnam Pillai* v. *Ganapathi Subramania Aiyar*[6], Raghava Rao, J., stated : " It is perfectly clear to my mind that this sort of conversion of immovable estate into a cash fund, although it may be that out of the fund she meant to maintain herself is *absolutely beyond the powers of the widow* ". With respect it may be urged that the question cannot be the subject of any hard and fast rule. This has been vividly brought out in *Kuthalinga Mudaliar* v. *Shanmuga Mudaliar*[1] where it is pertinently said that no widow is bound to starve herself or die in order to benefit the reversioners and that such a proposition would be monstrous and opposed to all principles of Hindu law. Devadoss, J., observed : " It is well settled that a widow can alienate her husband's property for paying off the debts incurred for her own maintenance. The question is whether she can do so for future maintenance. Each case would depend on its own circumstances ". In that case, the only item of property left by the husband was a small house. He had also left debts amounting to Rs. 300. The widow sold the house, discharged the debts and retained the balance for her future maintenance. In the circumstances the sale was upheld. In *Ramalinga Iyer* v. *Parvathammal*[2], it was found that after meeting the debts of her husband, the lands remaining with the widow would fetch her at best an annual income of Rs. 28. It was also found that the sale proceeds of those lands if invested at 12 per cent. per annum would enable her to realise by way of interest a sum of Rs. 10-8-0 per month. In upholding the sale, Venkatasubba Rao, J., observed : "It is not pretended that this young widow of twenty can live on Rs. 28 per year or Rs. 2 per month. In the circumstances does the Hindu law impose upon her any obligation to preserve the corpus and keep it intact for the benefit of the ultimate reversioners ? I do not think that any such onerous duty is cast upon a Hindu widow. She can certainly alienate the property for necessary purposes and the most obviously necessary purpose is her own maintenance. If the widow had not sold these lands she should be practically starving. I am clearly of the opinion that the purpose in the present case is a justifiable purpose ". There is much to commend the line of approach revealed in these two decisions. It is true that the price of property is uncertain and fluctuating from time to time. Equally the period for which the widow may live during which her right to maintenance will subsist is also uncertain. These factors cannot however justify a rule that the widow will have no competency to alienate the property inherited by her from her husband whatever the circumstances may be if the purpose of the alienation is her future maintenance. The balance of convenience lies in treating the question as being essentially one of fact and in the instant case it is that view that has been adopted.

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[1] A.I.R. 1949 Cal. 212.
[2] (1924) 44 Cal. L.J. 565.
[3] A.I.R. 1950 Cal. 520.
[4] A.I.R. 1954 Cal. 604.
[5] A.I.R. 1943 Bom. 266.
[6] (1952) 2 M.L.J. 679.

ASSAN KUTTY *v.* KUNHI MOIDEEN KUTTY, (1956) 1 M.L.J. 496.

This decision recognises that it is rather difficult to formulate the circumstances in which an appeal may be heard *ex parte* on the advocate for the respondent reporting no instructions. It realises that it will be equally difficult to treat an application to set aside the *ex parte* disposal and rehear the appeal as a matter covered by the provisions of Order 41, rule 21 of the Civil Procedure Code. The expression " no instructions " is one of convenience merely, usually relating directly to the fees paid or stipulated to be paid to the advocate. Quite often it happens that clients living in remote or relatively inaccessible places in rural areas may not either receive the communications sent to them by the advocate in time or may not be alive to the urgency of the matter and may therefore not remit the fees fully. In such cases there is likely to be some measure of hardship involved if the appeal is disposed of *ex parte*. In the instant case it is pointed out that in a large number of cases where the advocate reports no instructions it may be presumed that the clients have not responded to the demand for the payment of the balance of fees payable and therefore it would be desirable that in such cases a final opportunity may well be afforded in the form of a Court direction to the advocate to send a registered letter to the defaulting client and that the advocate may report to the Court no instructions if even then the client does not instruct him or himself attend the Court on the adjourned date. The learned Judge states that it would be a ' human approach ' to the problem to treat it that way instead of the Court disposing of the appeal *ex parte* even on the first occasion when no instructions are reported.

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[1] (1925) 50 M.L.J. 234.

[2] A.I.R. 1926 Mad. 1122.

The suggestion made by the learned Judge is wholesome and though even registered letters may not result in a more cordial response from the clients in the matter of remitting the balance of fees payable to the advocate they will subject the clients to the consequences of failure by them to attend the Court themselves.

JANABAI AMMAL *v.* NARASIMHALU NAIDU, (1956) 1 M.L.J. 519.

This case deals with the effect of the annulment of the adjudication of a person as insolvent on alienations which had been set aside in the insolvency. It is a principle of the law in England that the setting aside of an alienation is solely in the interest of the insolvent's creditors and to the extent that those interests do not require the setting aside such setting aside is automatically cancelled, In re *Parry: Ex parte Salaman*[1]. In India, section 37 of the Provincial Insolvency Act provides : " Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts there to fore, done, by the Court or receiver shall be valid ; but subject as aforesaid the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may by order in writing declare ". Explaining the scope of this reverter, in *Dharmasamrajayya* v. *Sankamma*[2], it was held that the annulment of the alienation made by the person adjudicated was only in the interest of his creditors and hence where the adjudication itself is annulled, the *status quo* is revived. In *Sakhamuri Perayya* v. *Nimmakaju Kondayya*[3] it was pointed out that the effect of the annulment of the adjudication relates back to the date of the adjudication and it is as if no adjudication had ever taken place except as regards the acts of the Court and the official receiver which are valid by reason of the section. In *Mohammad Hussain Sahib* v. *Kavutha Syed Mohammad Rowther*[4], the effect of the annulment of adjudication as insolvent is described as being tantamount to a relegation of the parties back to the position they would have occupied but for the insolvency. In *Subbiah Goundan* v. *Ramaswami Goundan*[5] it is pointed out that it is not as if the annulment of the adjudication puts the clock back in all cases but that the setting back is always subject to the conditions which may be imposed by the Court. The Full Bench held that the effect of the annulment of the adjudication is to vest the property retrospectively in the insolvent, in other words, the consequence of annulling an order of adjudication is to wipe out altogether the insolvency and its effect except to the limited extent reserved by section 37. The decision under review follows the principles stated above.

PERCY EDWARD WARNE *v.* THE OUCHTERLONY VALLEY ESTATE, (1956) 1 M.L.J. 556.

Contracts of service usually contain a provision for the service being determinable by a notice on either side, the actual period of such notice being fixed by the contract itself. In such cases the question not infrequently arises whether payment of salary for the notice period can take the place of the actual notice required. Decisions of the English Courts make it clear that this cannot be done. The employee will have at law the right to exercise the functions of his office during the notice period. It may also well be that in addition to salary there may be commissions accruing in his favour on the business done during the period according to the terms of the employment. In *Addis* v. *Gramophone Co., Ltd.*[6], the plaintiff was the manager of the defendants' business at Calcutta on a salary of £15 per week and a commission on the trade done. The contract of employment provided that he could be dismissed by six months' notice. In October, 1905, the defendants gave him notice and at the same time appointed one *G* to act as his successor and took steps to prevent the plaintiff from acting any longer as manager. It was held by the House of Lords that the dismissal from service was wrongful inasmuch

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1. L.R. (1904) 1 K.B. 129.
2. (1943) 1 M.L.J. 166.
3. (1948) 1 M.L.J. 290-293.
4. (1952) 2 M.L.J. 823.
5. (1953) 2 M.L.J. 766 (F.B.).
6. L.R. (1909) A.C. 488.

as the plaintiff should not have been prevented from functioning as manager during the notice period. It was also held that the damages to which the plaintiff would be entitled would be the salary for the six months' notice period together with the commission he would have earned had he been allowed to manage the business himself. These principles have been applied in subsequent cases, see *Rubel Bronze & Metal Co., and Vos,* In re[1]; *Connaught Properties, Ltd.* v. *Regional Properties, Ltd.*[2] In the instant case the contract of service was for four years determinable by three months' notice on either side. It was held that this did not mean that the paymens of salary for the notice period can take the place of the actual notice required unless the parties themselves had agreed to that effect, that the employee's dismissal without such notice was wrongful, that the measure of damages in such cases will only be the amount of wages for the period of service, and damages cannot be awarded on the basis of the salary for the entire unexpired period under the service contract.

THE PUDUKKOTTAI CERAMICS *v.* RAMANATHAN CHETTIAR, (1956) 1 M.L.J. 486.

This case draws pointed attention to the fact that the right which the liquidator has in the winding up of a company against a contributory is a statutory and not a contractual right as that between a company and its shareholder. Explaining the liability of a shareholder to contribute under section 38 of the English Companies Act, 1862, after a winding up order has been passed as a new liability, Sir George Jessel said[3] in striking language : "That is a new liability : he is to contribute : it is a new contribution. It is a liability to contribute to the assets of the company ; and, when we look further in the Act it will be seen that it is a liability to contribute to be enforced by the liquidator. It is quite true that a call made before the winding up is a debt due to the company, but that does not affect this new liability to contribution". The same position has been laid down in decisions rendered in this country as well. Thus in *Parell Spinning and Weaving Co., Ltd.* v. *Manek Haji*[4], Jardine, J., points out : "Although the liquidator is substituted for and enforces the right of the company, yet the winding up order calls into existence new rights and new liabilities which did not exist before ; and that equities which might have been set up against the company cannot prevail against the liquidator as representing the company". Following these dicta, the instant case holds that where a company goes into liquidation pending an appeal by it from a decree dismissing its suit for unpaid share money due by a shareholder who had defaulted to pay it after calls, the cause of action on which the suit was based does not survive to the liquidator so as to entitle the latter to come on record and continue the appeal as a legal representative of the appellant company, and the appeal abates.

N. KRISHNASWAMY AND OTHERS, *In re.*, (1956) 2 M.L.J. 2.

It has long been the law in England that after the prosecution has examined its witnesses and the defence has disclosed its case, the prosecution cannot call fresh witnesses to meet evidence that may be let in by the defence to contradict the prosecution case, see *R.* v. *Chapman*[5]. The rule equally applies where after the case for the defence is closed in a criminal case the Judge calls a witness. In *R.* v. *Holden*[6], on a trial for murder it appeared that three surgeons had examined the body of the deceased and that there had been a difference of opinion among them. Two of them were called for the prosecution but the third was not, and as his name was not on the back of the indictment the counsel for the prosecution declined to call him though he was in Court. Patteson, J., directed him to be called and he was examined by the learned Judge at the conclusion of the case for the prosecution. In doing so, the Judge observed : "As he is in Court I shall insist on his being examined. He is a material witness who is not called on the part of the prosecution and as he is in Court I shall call him *for the furtherance of the justice* ". Thus it was recognised that the Court can in a criminal trial call a witness not offered by the prosecution. The test is whether the furtherance of justice requires the same. The principle was stated more fully in *R.* v. *Frost*[1] where Tindal, C.J., observed : " There can be no doubt about the general rule that where the Crown begins a case (as it is with an ordinary plaintiff) they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso* which the Crown could not foresee, supposing it to be entirely new matter which they may be able to answer only by contradictory evidence, they may give evidence in reply ". The learned Chief Justice allowed witnesses to be called on that basis. In *King* v. *Dora Harris*[2], referring to the above passage, Avory, J., observed : " That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should apply to a case where a witness in called in a criminal trial by the Judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises as *ex improviso* which no human ingenuity can foresee on the part of a prisoner ; otherwise injustice would ensue ". Adverting to the facts of the particular case before him Avory, J., said : " In the circumstances without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed we are of opinion that in this particular case the course that was adopted was irregular and was calculated to do injustice to the appellant Harris ". In India, section 540 of the Criminal Procedure Code lays down : " Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall or re-examine any persons already examined ; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the *just decision of the case* ". In English law the power was to be exercised for the furtherance of the justice. Under the Criminal Procedure Code it is to be utilised for the just decision of the case. The first part of the section enables the Court to examine a witness at any stage. The second part is a mandatory provision compelling the Court to examine a witness if it appears to it that his evidence is essential to the just decision of the case. The power given to the Court in India is statutory and very wide. Nevertheless in view of the fact that the English law has been the source from which the Indian law has been fashioned, the limitations observed in England to the exercise of the Court's power to examine witnesses after the defence case is closed are observed in this country as well. In *Narayanan Nambiar* v. *Emperor*[3], after a consideration of the English as well as Indian decisions, Horwill, J., remarked " If in the present case the learned Magistrate had examined C. W. 1 for the sole purpose of contradicting D. W. 6 I might have been inclined to hold that he had not exercised his powers under section 540, Criminal Procedure Code ". In *K. V. R. S. Mani*, In re[4], it was pointed out that the very width of the discretion conferred by section 540 requires a corresponding caution in using the power, that by its very nature the discretion to be exercised under the section depends on the facts of each case, and that where the prosecution knowing full well and being in possession of all the materials which can be spoken to by a particular witness and intending to call him as a witness and intimating to the Court at one stage that it intends to do so yet fails to so call him, the Court cannot exercise its powers under section 540 to call such a person as a Court witness inasmuch as the exercise of the Court's powers that way will only amount to filling up a gap in the prosecution evidence. The Court observed : " In this case. . . Mr. Venkatarama Aiyar is essentially a witness for the prosecution who should have cited him either in the charge-sheet or immediately afterwards. The failure of the prosecution to call him as a witness cannot be made up by the Court exercising its powers under section 540, Criminal Procedure Code. Although a Court can examine a witness at the instance of the prosecution or defence, still, when the prosecution asks the Court to examine him though it had intended to do do so, that should be no ground for the Court to exercise its discretion under section 540, Criminal Procedure Code ". In regard to the meaning of the expression 'just decision' in the section it has been pointed out that it does not mean a decision in favour of the defence and that the only restriction is that the power should not be exercised to save parties from trouble and expense, *Rangaswami Naicker* v. *Muruga Naicker*[1]. The instant decision reaffirms that the discretion given to the Court under section 540 is a judicial discretion and it can be exercised to call a person as a Court witness only if the Court is of the opinion that any matter has arisen *ex improviso* which could not have been contemplated by the prosecution.

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[1] L.R. (1918) 1 K.B. 315.

[2] L.R. (1942) 2 K.B. 314.

[3] *White House* & *Co.,* In re., (1878) L.R. 9 Ch. 595.

[4] (1886) I.L.R. 10 Bom. 483.

[5] (1838) 8 C. & P. 558 : 173 E.R. 617.

[6] (1838) 8 C. & P. 606 : 173 E.R. 638.

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[1] (1839) 9 C. & P. 129, 159: 173 E.R. 771, 784.

[2] L.R. (1927) 2 K.B. 587.

[3] (1941) 2 M.L.J. 787.

[4] (1951) 1 M.L.J. 184.

KRISHNAMMAL *v.* KRISHNA, (1956) 2 M.L.J. 30.

This decision makes it clear how a receiver appointed under section 69-A of the Transfer of Property Act occupies a position altogether different from that of a receiver appointed by the Court in a pending action under the provisions of Order 40, rule 1 of the Civil Procedure Code. The former is only a special receiver appointed for a particular purpose, namely, to receive the income of the mortgaged property for which purpose he is invested with full powers of recovery in the name of the mortgagor or the mortgagee and give effectual receipts. He is an agent of the mortgagor and the latter will be solely responsible for his acts and defaults unless the mortgage deed otherwise provides. A receiver appointed by the Court under Order 41, rule 1, Civil Procedure Code, is an officer of the Court and holds the property for the benefit of all the parties and is not the agent of the mortgagor. Thus it is clear that a receiver functioning in pursuance of section 69-A of the Transfer of Property Act has neither the powers nor the status of a receiver appointed by the Court under the Civil Procedure Code. It is made clear by sub-section (2) of section 69-A that the receiver under that section is to be deemed to be duly appointed by the mortgagee. Being a receiver appointed for a special and limited purpose the instant decision points out that such a receiver cannot have the power for instance to sell the mortgaged property. In *Saraswathi Bai* v. *Varadarajulu Naicker*[2], it is laid down that the existence of a receiver under section 69-A will not even be an impediment to the exercise by the mortgagee of the concurrent power of sale out of Court under section 69 of the Act and no leave of Court will be necessary for the purpose.

WASIM KHAN *v.* STATE OF UTTAR PRADESH, (1956) 2 M. L. J. (S.C.) 9.

No hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. What exactly the possession of stolen property with a person may be indicative of has frequently come up for examination both in England as well as in India. The rule in regard to that matter as observed in the former country is stated as follows in Wills on Circumstantial Evidence : " The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been committed with theft. This particular fact of presumption commonly forms a material element of evidence in cases of murder ; which special application of it has often been emphatically recognised ". In India, section 114 of the Evidence Act lays down : " The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, public and private business in their relation to the facts of the particular case ". Illustration (*a*) provides that a man who is in possession of

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1. (1952) 2 M.L.J. 497.

2. I.L.R. (1955) Mad. 1310: (1956) 1 M.L.J. 223.

stolen goods soon after the theft may be presumed to be either the thief or that he has received the goods knowing them to be stolen unless he can account for his possession. The matter may not, however, stop there. A presumption that the person in possession is guilty of even a greater offence may arise in certain circumstances. In *Queen Empress* v. *Sami*[1], the Court held that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was, in the circumstances of the case, similarly evidence against them on the charge of murder. In *Emperor* v. *Sheikh Neamatulla*[2], which was a case of murder, blood-stained ornaments were found in the room occupied by the accused and the evidence showed that those articles belonged to the deceased. In the Sessions Judge's charge to the jury there was no direction pointing out that the possession in this case, if believed, was a fact from which not merely a presumption of theft or receipt of stolen property but also of murder with which the accused was charged may be drawn. The Court held that this was a serious omission detracting materially from the value of the verdict and opinion of jurors. Similarly in *Emperor* v. *Chintomani Sahu*[3], after referring to the principle as stated in Wills on Circumstantial Evidence, the learned Judge added : " The presumption would be particularly applicable where, as in the present case, there is satisfactory proof that the necklace was habitually worn by the deceased and that she was actually seen wearing it on the evening before the murder ". The Madras High Court has reviewed the question fully in *Kallam Narayana* v. *King-Emperor*[4]. It was there held that under section 114 the Court is entitled, if it appears reasonable in all the circumstances of the case to draw an inference that an accused person committed a murder or took part in its commission, from the facts that he is found in possession of property proved to have been in the possession of the murdered person at the time of the murder and that he fails to give any explanation of his possession of the property which can be reasonably accepted. The Nagpur High Court has followed the views of the Madras and the Calcutta High Courts on the question, and held in *Ramprasad Makundram* v. *The Crown*[5], that " the accused's possession of the ornaments belonging to the deceased woman soon after her murder is material evidence against the accused not only on the charge of robbery but also on the charge of murder ". In Madras itself the matter was again considered in *Guli Venkataswami*, In re[6], where the Court observed : " It is obvious that unexplained possession of a jewel of a murdered person will be evidence under section 114 of the Indian Evidence Act not only regarding theft but also regarding the murder itself if the possession could not be reasonably got without committing the murder ". In every one of these cases the possession of stolen property was accompanied by other facts and it was as a cumulative result of all the facts that the presumption of an offence graver than theft or receipt of stolen property was drawn. In *Sanwat Khan* v. *State of Rajasthan*[7], the Supreme Court points out that where the only evidence against the accused is the recovery of stolen property, though the circumstances may indicate that theft and murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. It was held that the only inference that can be raised from the circumstance of the unexplained possession was that the accused were receivers of stolen property or were persons who had committed the theft but that it would not necessarily indicate that the theft and the murders took place at one and the same time. In the instant case, the Supreme Court takes the view that recent possession of the property of a deceased person in circumstances indicating the the deceased had been murdered and robbed would suggest that not only the possessor of the property was a thief but that it also indicated that he was guilty of a more aggravated crime which had connection with the theft.

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1. (1890) I.L.R. 13 Mad. 426, 432.
2. (1913) 17 Cal. W.N. 1077.
3. A.I.R. 1930 Cal. 379.
4. (1933) I.L.R. 50 Mad. 231.
5. A.I.R. 1949 Nag. 277.
6. (1950) 1 M.L.J. 36 : I.L.R. (1950) Mad. 1113.
7. A.I.R. 1956 S.C. 54 (S.C.).

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NOTES OF RECENT CASES.

[Supreme Court.]

S. R. Das, C.J., N. H. Bhagwati,
T. L. Venkatarama Ayyar, B.P. Sinha
and S.K. Das, JJ.
15th November, 1956.

Chief Commissioner, Ajmer *v.*
Radhey Sham Dhani.
C.A. No. 181 of 1956.

Ajmer-Merwara Municipalities Regulation (*VI of* 1925), *sections* 8 (1), 30, 21 *and* 43 —*Scope.*

The Electoral Roll of the Ajmer Municipality which was authenticated and published by the Chief Commissioner on the 8th August, 1955, was not in conformity with the provisions of the Municipal Regulation and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee.

M. M. Kaul and *R. H. Dehbar,* Advocates, for Appellant.

Respondents not represented.

G.R. *Appeal dismissed.*

[Supreme Court.]

S.R. Das, C.J., N.H. Bhagwati,
T.L. Venkatarama Ayyar, B.P. Sinha
and S.K. Das, JJ.
23rd November, 1956.

Dhrangadra Chemical Works *v.*
State of Saurashtra.
C.A. No. 85 of 1956.

Industrial Disputes Act (*XV of* 1947)—" *Workman* "—*Essential conditions.*

The essential condition for a person being a workman within the terms of the definition in the Industrial Disputes Act was that he should be in the employment of his employer and that there should be the relationship between the employer and him as between master and servant.

R. J. Kolah, Advocate, for Appellants.

P. Metha for Respondents.

G.R. *Appeal dismissed.*

[Supreme Court.]

S. R. Das, C.J., N.H. Bhagwati,
T. L. Venkatarama Ayyar, B. P. Sinha
and S. K. Das, JJ.
27th November, 1956.

Barsi Light Rly. Co., Ltd. *v.*
K. N. Jogelekar and
P. Hariprasad Shukla *v.* A.D. Divekar.
C.A. Nos. 105 and 103 of 1956.

Industrial Disputes Act (*XV of* 1947), *section* 25-*F*—*Compensation for retrenchment* —*Definition of* " *Retrenchment* " *under section* 2.

The essential requirements of the definition of " Retrenchment " in section 2 of the Industrial Disputes Act were fulfilled by the ordinarily accepted meaning of the term "retrenchment" and therefore when within the frame work of the ordinary acceptance of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined ; it means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and *bona fide* closure of business.

S. M. Bose, Advocate-General, with *Messrs. Palkhiwala* and *Dadachanji*, Advocates, for Appellants.

Attornery-General of India (*M. C. Setalvad*) with *Messrs. P. Mehta* and *R. Patil*, Advocates, for Respondents.

G.R. ——— *Appeals allowed.*

[SUPREME COURT.]

S. R. Das, C.J., N. H. Bhagwati, T. L. Venkatarama Ayyar, B. P. Sinha and S. K. Das, JJ.
28th November, 1956.

Banaras Ice Factory *v.* Its Workmen.
C.A. No. 135 of 1956.

Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), *section* 22—*Scope —Discharge of workmen due to closure of business—Permission of Tribunal—If essential.*

When workmen are discharged by the employer as a result of a *bona fide* closure of business during the pendency of proceedings before an Industrial Tribunal it is not necessary to obtain the prior permission of the Tribunal.

R. R. Biswas, Advocate, for Appellant.

Sukumar Ghosh, Advocate, for Respondents.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

S. R. Das, C.J., N. H. Bhagwati, T. L. Venkatarama Ayyar, B. P. Sinha and S. K. Das, JJ.
28th November, 1956.

A. S. Krishna *v.* State of Madras.
Cr. A. Nos. 20-23 of 1955.

Madras Prohibition Act (X of 1937), *section* 4 (2) *and sections* 28 *to* 32—*Constitutional validity of.*

The Madras Prohibition Act (X of 1937) is within the competence of the Legislature and the question of repugnancy under section 107 of the Government of India Act, 1935, does not arise. Sections 4 (2) and 28 to 32 of the Prohibition Act are constitutional and the Act did not infringe Article 14 of the Constitution.

(1954) 2 M.L.J. 475, affirmed.

N. C. Chatterjee, Senior Advocate, for Appellant.

The Advocate-General, Madras (*V. K. Thiruvenkatachari*) with *Ganpatiaiyer*, Advocates, for Respondents.

G.R. ——— *Appeal dismissed.*

[SUPREME COURT.]

S. R. Das, C.J., N. H. Bhagwati, T. L. Venkatarama Ayyar, B. P. Sinha and S. K. Das, JJ.
30th November, 1956.

New Prakash Transport Co., Ltd. *v.* Suwarna Transport Co., Ltd.
C. A. No. 74 of 1956.

Practice—Complaint that an adjournment that should have been granted was not granted —If can be raised at appellate stage where party did not pray for it in Court of first instance.

Even in a Court of law a party is not entitled to raise the question at the appellate stage that he should have been granted an adjournment which he did not pray in the Court of first instance. Far less such a claim can be entertained in an appeal from a Tribunal which is not a Court of Justice, but a statutory body functioning in a *quasi*-judicial way—(Appellate Authority under Motor Vehicles Act.).

C. K. Daphtary, Solicitor-General of India, for Appellant.

M. C. Setalvad (*Attorney-General*), for Respondent.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

S.R. Das, C.J., N.H. Bhagwati,
T.L. Venkatarama Ayyar, B.P. Sinha
and S.K. Das, JJ.
29th November, 1956.

Lalit Mohan Das *v.* Advocate-General, Orissa.
C.A. No. 176 of 1956.

Legal Practitioners Act (*XVIII of* 1879), *sections* 13 *and* 14—*Member of the Bar attributing partiality and unfairness to Judge in open Court—Misconduct.*

A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for review of that order. But when he makes imputations of partiality and unfairness against the munsiff in open Court he must be held to have grossly overstepped the limits of propriety and guilty of misconduct.

N.C. Chatterjee, for Appellant.

The Solicitor-General of India (*C.K. Daphtary*), for Respondent.

G.R. ——— *Appeal dismissed.*

[SUPREME COURT.]

N.H. Bhagwati, B. Jagannadhadas,
T.L. Venkatarama Ayyar, B.P. Sinha,
and S.K. Das, JJ.
21st December, 1956.

M.S. Pannalal Binjraj *v.* Union of India.
Petitions Nos. 97, 97-A, 86 to 88, 111, 112, 85, 158, 211 to 215 and 225 to 229 of 1956.

Income-tax Act (*XI of* 1922), *sections* 5 (*7-A*) *and* 64—*Validity and scope.*

Section 5 (7-A) of the Income-tax Act is not *ultra vires* and it will be open to the Commissioner of Income-tax and the Central Board of Revenue, who are the highest amongst the Income-tax authorities under the Act to transfer the case of a particular assessee from one Income-tax officer of the area to another Income-tax officer if exigencies of tax collection warrant the same. The power given under this provision was not a naked and unfettered power and was to be exercised with due regard to the object of collecting the tax. It would be desirable that normally a person whose case was to be transferred should be given notice to enable him to represent his views against the transfer.

N.C. Chatterjee, Purshottamdas Trikamdas, Issacs, for Petitioners.

The Solicitor-General of India (*C.K. Daphtary*) for Respondent.

G.R. ——— *Petitions dismissed.*

[SUPREME COURT.]

N.H. Bhagwati, T.L. Venkatarama Ayyar,
B.P. Sinha and S.K. Das, JJ.
21st December, 1956.

Harish Chandra Bajpai *v.* Triloki Singh.
C.A. No. 333 of 1956.

Representation of the People Act (*XLIII of* 1951), *section* 83 (3)—*Jurisdiction of the Election Tribunal to allow an amendment of an election petition.*

Under section 83 (3) of the Representation of the People Act the Tribunal has power to allow particulars in respect of illegal or corrupt practices to be amended provided the petition itself specifies the grounds or charges and this power extends to permitting new instances to be given.

The Tribunal has power under Order 6, rule 17 of the Civil Procedure Code to order amendment of a petition, but that power cannot be exercised so as to permit new grounds or charges to be raised so as to alter its character as to make it in substance a new petition, if a fresh petition on those allegations will be barred.

The amendments allowed by the Tribunal in the instant case did not fall under any of the original grounds and being made after limitation should not have been allowed by the Tribunal.

The Solicitor-General of India (*C.K. Daphtary*) with *S.S. Shukla* for Appellants.

K. S. Krishnaswami Ayyangar for Respondents.

G.R. ——— *Appeal allowed.*

Rajamannar, C.J.
9th November, 1956.

State *v.* Perumalswami Nadar.
C.R.P. No. 208 of 1955.

Civil Procedure Code (V of 1908), *sections* 35 *and* 115—*Costs—Disallowance of—Interference in revision.*

Ordinarily the High Court would not interfere in revision with an order as to costs. But where a suit has been pending for nearly three years and had undergone many adjournments and is permitted to be withdrawn and dismissed, costs should follow the event unless there are special circumstances.

The Government Pleader (*C. A. Vaidialingam*) for Petitioner.

T. S. Nagaswami Ayyar, J. Nagarajan and *T. R. Sangameswara Ayyar*, for Respondent.

R.M. *Petition allowed.*

Rajagopalan, J.
16th November, 1956.

Sankar Transport Service *v.*
State Transport Appellate Tribunal.
W.P. No. 1251 of 1956.

Motor Vehicles Act (IV of 1939), *section* 64 *and Motor Vehicles Rules, rule* 185 —*State Transport Appellate Tribunal—Powers of—Power to grant stay of operation of order of Regional Transport Authority.*

The jurisdiction of a statutory Tribunal like the State Transport Appellate Authority under the Motor Vehicles Act, to entertain and dispose of appeals carries with it the power to prevent the right of appeal becoming ineffective. This power is indispensable in the Tribunal and is incidental to or consequential on the express powers conferred by the Statute.

In an appeal against an order of the Regional Transport Authority refusing to renew the permit of the appellant, the Appellate Tribunal has power (1) to stay the operation of the order refusing to renew the permit to the appellant (2) stay the operation of the order granting permit to some other operator and (3) give directions that the service on the route or routes in question be maintained in the interests of the public by the appellant.

M. K. Nambiar and *G. Krishna Ayyangar*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*), *S. Gopalaratnam* and the Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. *Petition dismissed.*

Ramaswami, J.
19th November, 1956.

Somanathan Chettiar *v.*
Arunachalam Chettiar.
Appeal No. 498 of 1952.

Custom—Nattukkottai Chetty Custom—' Maraldar '—*Nature and powers of.*

A *maraldar* among the Nattukkottai Chettiars, is an intermediary, who is generally a relation of the *vilasadar* or one who takes interest in the welfare of the *vilasadar* who is very often a minor, young man or woman. In cases of deposits, the receipts are drafted under a double liability to the *maraldar* and *vilasadar* and neither could deal with it without the permission of the other. In case of several *maraldars*, they are not copayees and one *maraldar* cannot give a valid discharge of a debt without the concurrence of the other *maraldars*.

The position of a *maraldar vis-a-vis* the depositee approximates most to a case of a cheque drawn in the form of Pay A-B per X. A depositee who permits a *maraldar* to withdraw the moneys will still remain liable to the person for whom the amount was intended and the depositee cannot be heard to plead that there was no privity of contract between him and the *vilasadar*

R. Gopalaswami Ayyangar, for Appellant.

T. R. Srinivasan and *K. Bashyam*, for Respondent.

Case-law reviewed.

R.M. *Appeal allowed.*

Rajagopalan, J. Alagappa Chettiar *v.*
20th November, 1956. Corporation of Madras.
W.P. No. 277 of 1955.

Madras City Municipal Act (*IV of* 1919), *section* 98-*A—Tax imposed by Corporation of Madras on advertisements by roll films—Validity.*

The levy of a tax on advertisements by exhibition of roll films on screens, by the notification dated, 19th February, 1955, is a new tax and is invalid as the provisions of section 98-A of the Madras City Municipal Act have not been followed.

The notification authorising imposition of a tax on advertisements by lantern slides or similar devices, will not cover a case of advertisement by motion films.

R. M. Seshadri and *R. Rajagopala Ayyar*, for Petitioner.

Dr. V. K. John for *Messrs. John and Row*, for Respondent.

R.M. *Rule absolute.*

Rajagopala Ayyangar, J. Periaswami Gounder *v.* State.
27th November, 1956. W.P. No. 801 of 1955.

Arms Act (*XI of* 1878), *section* 18 (a)—*Cancellation of licence—Validity—Reasons for cancellation should be stated and communicated to the licensee.*

The right to a licence under the Arms Act is a fundamental right protected by Art. 19 (1) (*f*) of the Constitution subject to reasonable restrictions. The authorities cannot arbitrarily refuse to grant a licence. Where a person is in possession of a valid licence, it can be terminated only after notice to the licensee and even then for reasonable cause which should be stated in the notice. It cannot be said in such cases that the order is an administrative one or executive order and as such not subject to the jurisdiction of the High Court under Article 226 of the Constitution. Such orders involve not merely the right to acquire property but also the right to 'hold' property.

The mere mention in the order that the cancellation of licence was in the interest of public security is not sufficient. Under section 18 (*a*) of the Arms Act what is contemplated is the conduct of the licensee and not the mere conclusion of the authority concerned. The reasons for the cancellation of the licence should be stated in the order and communicated to the licensee.

Decision in W.P. No. 449 of 1953 differed.

(1953) 1 M.L.J. 418 followed.

M. R. Narayanaswami, for Petitioner.

V. Srinivasan for Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. *Rule absolute.*

Rajagopala Ayyangar, J. Dr. Narayanamurthi *v.*
27th November, 1956. Madras Medical Council.
W.P. No. 808 of 1956.

Indian Medical Council Act (*XXVII of* 1933)—*Madras Medical Council—Powers and jurisdiction to punish for violation of the Code of Medical Ethics—Clauses* 5 *and* 6 *of the Code—Prohibition against and advertising aiding an unqualified person.*

The decisions of a domestic tribunal like the Madras Medicial Council will not be open to interference by the High Court under Article 226 of the Constitution unless the tribunal has exceeded its jurisdiction or the procedure adopted by it is contrary to the principles of natural justice. The 'advertising and canvassing' that is prohibited by rule 6 (*a*) or (*b*) of the Code of Medical Ethics is only those that are made with a view to getting patients or promoting the professional advantage of the advertising practitioner. The misconduct envisaged by clause 5 of the Code is that with the aid of a registered medical practitioner an unqualified or unregistered individual is enabled to treat a patient.

S. V. Venugopalachari, P. C. Parthasarathi Ayyangar and *Kasturi Sivaprasada Row*, for Petitioner.

V. Srinivasan for Special Government Pleader (*V. V. Raghavan*) for Respondents.

R.M. *Rule absolute.*

Rajagopala Ayyangar, J. Vridhapureeswaraswami Devasthanam *v.* State.
27th November, 1956. W.P. No. 907 of 1955.

Madras Estates Land (Reduction of Rent) Act (XXX of 1947) *and Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of* 1948)*—Combined effect of—If Rent reduction could apply even after the taking over of the Estate under the Estates Abolition Act.*

Proceedings under the Madras Estates Land (Reduction of Rent) Act, 1947, could be taken in respect of lands in an Estate as defined by the Act, even after a notification taking over of the estate under the Estates Abolition Act. The taking over of the estate under Act XXVI of 1948 does not put an end to the applicability of Act XXX of 1947. The saving clause in section 3 (*a*) of Act XXVI of 1948 comprehends a saving of not only the application of the Rent Reduction Act but also of the Estates Land Act, 1908, the continued existence of which is necessary for the purpose of giving effect to the Rent Reduction Act.

M. S. Venkatarama Ayyar and *R. Sundaralingam*, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. ——— *Petition dismissed.*

Rajamannar, C.J., and Panchapakesa Ayyar, J. Natarajan *v.* R.T.O., Chingleput.
30th November, 1956. W.A. Nos. 45 & 75 of 1954.

Motor Vehicles Act (IV of 1939)*—Suspension of permit for breach of conditions of permit—Expiry of the period covered by the permit—Suspension order if could be enforced against the renewed permit.*

In cases of route permits issued under the Motor Vehicles Act there is an integral connection between the original permit and the permit granted in renewal of it. It may be that in certain respects a renewed permit may resemble a fresh permit. But after renewal it is the original permit that continues in force, under the scheme of the Act and Rules, for a further period for which it is renewed after the expiry of the period for which it was originally granted. Hence the penalty for a breach of any of the conditions of the original permit committed during period of the original permit, can be enforced during the further period for which the permit continues to be in force after renewal.

(1956) An.W.R. 344; W.A. No. 42 of 1956 differed.

A.I.R. 1956 Mad. 143 referred.

N. G. Krishna Ayyangar and *P. Babulu Reddi*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. ——— *Appeals dismissed.*

Rajamannar, C.J., and Panchapakesa Ayyar, J. Marudamuthu *v.* Arunachalam Chettiar.
30th November, 1956. Appeal No. 649 of 1952.

Minor—Decree against—Gross negligence of guardian—Avoidance of the decree—Principle—If applies to appeals and execution proceedings—Test to determine negligence.

It is now well settled law that a minor is not bound by a decree in a suit against him if he is able to show that his guardian was guilty of gross negligence in the conduct of the suit. This principle of safeguarding the interests of a minor against the negligence of his guardian can be extended to appeals and execution proceedings also. Where a guardian or his lawyer was negligent in not filing an appeal, where one was certainly called for, against a decision in a suit conducted by him it will entitle the minor to rely on this principle The principle is not one of natural justice or private international law, but is peculiar to India.

What will amount to gross negligence in the conduct of a suit or failure to prefer an appeal or not engaging a sufficiently competent lawyer will depend on the facts of each case.

Case-law reviewed.

R. Desikan, for Appellant.

C. A. Seshagiri Sastri, *T. M. Krishnaswami Ayyar*, *K. Vaideeswaran* and *R. Visvanathan*, for Respondent.

R.M. — *Appeal dismissed.*

Ramaswami, J.
4th December, 1956.

Nataraja Mudali *v.* Premavathi.
Appeal No. 282 of 1953.

Hindu Law—Father's obligation to get his daughter married—Duty —If legal or moral —Absence of joint family property in his hands—Effect.

Quaere :—In the absence of any joint family funds in his hands, is a Hindu father under a legal duty to get his daughter married or defray the expenses of the the marriage ?

26 Mad. 505 ; (1949) 2 M.L.J. 732 ; (1956) 2 M.L.J. 193 *held* requires reconsideration.

V. T. Rangaswami Ayyangar, and *K. Kalyanasundaram*, for Appellant.

C. A. Vaidialingam and *T. Venkatadri*, for Respondent.

R.M. — *Appeal dismissed.*

Basheer Ahmed Sayeed, J.
4th December, 1956.

Ramaswami Iyer *v.* Trustee. V. V. Charities.
C.R.P. No. 1242 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (a) *—Trustees requiring the premises in the occupation of tenant for the purposes of the trust—* Bona fides*—Test—Jurisdiction of Revisional Court.*

Where a trustee applies for eviction of a tenant of the trust property on the ground that the same is required for the purposes of the trust, the *bona fides* of the trustee has to be tested in relation to the purpose for which the property has been reserved by the trust. The mere fact that the trustees ignored the object and purpose of the trust for a number of years will not preclude them from enforcing the object of the trust and seeking to evict a tenant of the trust property. Where the conclusions of fact as regards *bona fides* by the Courts below are arrived at by a wrong approach which results in manifest injustice, the revisional Courts will be justified in interfering even if it is a concurrent finding on a question of fact.

O. Radhakrishnan and *M. R. Krishnan*, for Petitioner.

T. Venkatadri, for Respondent.

R.M. — *Petition dismissed.*

Somasundaram, J.
7th December, 1956.

Ramaswami Mudaliar, *In re.*
C.R.P. No. 1570 of 1956.

Provincial Small Cause Courts Act (IX of 1887), *Schedule II—Article* 11*—Suit for recovery of price paid for purchase of immoveable property—If amounts to an assertion of right or interest in immoveable property.*

A suit for recovery of damages, being the price paid by a purchaser to the vendor for the purchase of immoveable property, where the purchaser has been dispossessed by the rightful claimant, is not a suit to determine or enforce any right or interest in immoveable property and as such is not taken away from the jurisdiction of a Provincial Small Cause Court by Article 11 of Schedule II of that Act.

R. Krishna Ayyar, for Petitioner.

R.M. — *Petition not admitted.*

Rajagopalan, J. Pethanna Chettiar *v.* State.
7th December, 1956. W.P. No. 204 of 1955.

Constitution of India, (1950), *Article* 226—*Principle of natural justice—Violation of—Administrative order affecting rights of parties—If could be interfered with.*

S. O. No. 77 (1) (*iii*) of the Stamp Manual authorises the revenue authorities to licence stamp vendors and fix the place where the licenced stamp vendor should sell the stamps. Any order of the Government changing the place of business of a licensed stamp vendor has to be made only after giving the person concerned an opportunity to make his representation.

A person who has been granted a licence to sell stamps at a specified place gets a right and any change in the obligations imposed upon the licensee is not a mere administrative act. It is a quasi-judicial determination though undertaken in the course of administration.

Quaere.—Has the Government jurisdiction to revise the orders of the Revenue Board and Subordinate Revenue Authorities under S. O. 77 of the Stamp Manual?

A. V. Narayanaswami Ayyar and *R. Venkatachalam,* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *R. Gopalaswami Ayyangar,* for Respondent.

R.M. ——— *Rule absolute.*

Ramaswami, J. Venkatalaxmi Ammal *v.* Ramanathan.
11th December, 1956. Appeal No. 180 of 1953.

Hindu Law—' Varadakshina ' or ' bridegroom's price—If exclusively the bridegroom's or a gift to the bride—Test to determine.

The question whether varadakshina or the bridegroom's price belongs solely to the wife or the husband will depend on whether the money was intended to benefit the bride or the bridegroom exclusively. In certain cases a good portion of varadakshina might be intended to cover gift to the bride and in certain other cases it may amount to an out and out gift to the bridegroom or even to the bride, made formally in the name of the bridegroom. Each case will have to be decided on its own merits and the evidence and no general rule can be laid down.

Sarkar Sastri's "Hindu Law", VIII edition pages 553-54, held too wide.

R. Viswanathan, S. Tyagaraja Ayyar and *N. Vahchinathan,* for Appellant.

V. Seshadri and *K. S. Ramamurthi,* for Respondent.

R.M. ——— *Appeal dismissed.*

Rajagopalan, J. Sambandam *v.* Sirkali Panchayat.
17th December, 1956. S.R. No. 32472 of 1956.
W.P. Nos. of 1956.

Constitution of India (1950), *Article* 226—*Practice—One consolidated petition for distinct reliefs—Permissibility.*

Where a petitioner seeks distinct and separate reliefs for issue of writs of *certiorari* in respect of distinct orders, he has to pay separate Court-fee, file separate vakalats and other enclosures in respect of each of the reliefs.

(Office-note accepted).

T. S. Kuppuswami Ayyar, for Petitioner.

R.M. ——— *Directions issued.*

Ramaswami, J. Vani Musicals, *In re.*
17th December, 1956. C.R.P. No. 1691 of 1956.

Madras Buildings (*Lease and Rent Control*) *Act* (*XXV of* 1949), *section* 7 (3) (a) (*iii*) —*Landlord requiring his own building for the purpose of business which he is carrying on—Scope of.*

Obiter.—As carrying on of a business takes in many acts, every act in the series will amount to carrying on of business and even the stage of preparation for carrying on a business would come within the scope of section 7 (3) (*a*) (*iii*) of the Madras Buildings (Lease and Rent Control) Act, 1949. Only a mere intent to start a business with nothing more unrelated to any actual preparation for starting the contemplated business would be ruled out.

P. S. Kothandapani, for Petitioner.

R.M. ——— *Petition dismissed.*

[SUPREME COURT.]

N. H. Bhagwati, T. L. Venkatarama Ayyar, B.P. Sinha and S.K. Das, JJ.
20th December, 1956.

Punjab National Bank *v.* Sri Ram Kanwar.
C.A. No. 134 of 1955.

Industrial Disputes Act (XIV of 1947), *section* 11 (7)—*Discretion of Tribunal—Order for payment of travelling and stay expenses of respondents in advance—Propriety.*

" It is a mere negation of justice and reason to direct the appellant to pay in advance the costs of the respondents irrespective of the final result of the proceedings".

R. L. Anand for Appellant.

Y. Kumar for Respondent.

G.R. ——— *Appeal allowed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
16*th November,* 1956.

Collector of Customs *v.* Rahiman.
W. A. Nos. 120 of 1955 and 53, 55 and 89 of 1956.

Sea Customs Act (VIII of 1878), *sections* 167, 182 *and* 183—*Order of confiscation by the Collector of Customs—If quasi-judicial or administrative—Order of lower authority merging in order of superior or appellate authority—Inferior authority within the jurisdiction of High Court and superior authority outside—Effect of.*

An order of a person or body of persons, not being a Court in its strict sense, having legal authority to decide questions affecting the rights of subjects and who are under a duty to act judicially should be deemed to be quasi-judicial. Judged by these tests a Collector of Customs under the Sea Customs Act acts in a judicial or *quasi*-judicial capacity.

56 C.W.N. 452 and (1953) S.C.J. 456 : (1953) 2 M.L.J. 113 (S.C.), referred to.

As a general rule when an order of an inferior tribunal is carried up in appeal or revision to a suprior tribunal situated outside the jurisdiction of the High Court concerned and the superior tribunal passes an order confirming, modifying or revising the order of the inferior tribunal, no writ can issue against the first tribunal, though it is situated within the jurisdiction of the High Court concerned. But in cases where the orders passed by the authority in the territories within the jurisdiction of the High Court concerned are not merged in the order of the superior authority the High Court can give effective relief to the aggrieved party by the issue of writ against the order of the inferior tribunal.

In cases, however, where the order of the inferior tribunal is void *ab initio* and is a nullity being one passed without notice or enquiry and as such contrary to principles of natural justice, the mere fact that there was an appeal to a superior tribunal which merely refused to interfere, will not oust the jurisdiction of the High Court to interfere with the order of the inferior tribunal.

L.R. (1927) 1 K.B. 491 at 504 and L.R. (1953) 2 Q.B. 18, Referred to.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Special Government Pleader (*V. V. Raghavan*), for Petitioner.

V. C. Gopalaratnam, L. V. Krishnaswami Ayyar, Sundararajan, Sivaswami and *A.R. Krishnaswami*, for Respondent.

R.M. ——— *Orders accordingly.*

Somasundaram, J.
22*nd November,* 1956.

Venkatarama Ayyar, *In re.*
Crl. Rev. Case No. 803 of 1956.

Essential Commodities Act (X of 1955), *section* 7 (i) *and* (ii) *and Madras Rice Mill Licensing Order,* 1955, *clause* (2)—*Rice Mill duly licensed under the Madras Rice Mill Licensing Order,* 1955—*Licence in the name of owner—Mill leased out—Lessee running the mill—Lessee—If should take out a licence in his name.*

Clause (2) of the Madras Rice Mill Licensing Order, 1955, provides that no person shall mill rice or hull paddy, *etc.*, by power-driven machinery except in accordance with a license issued in that behalf. The license contemplated under the provision is personal to the licensee as such and not on behalf of the mill. Hence though a rice mill was being run by its owner under a license, when the ownership of the mill changes or the mill is leased out to another, the lessee cannot continue to run the mill without a fresh license in his name. If the mill is run without such a license the lessee is liable for prosecution under section 7 (i) and (ii) of the Essential Commodities Act.

T. S. Kuppuswami Ayyar and *V. Meenakshisundaram*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the State.

R.M. ——— *Petition dismissed.*

Rajagopalan and Rajagopala Ayyangar, JJ. Sundararaja Iyer *v.*
26th November, 1956. Sub-Collector, Dindigul.
W.P. No. 646 of 1956.

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 4—*Validity—If opposed to Article* 19 (1) (f) *and* (g) *of the Constitution of India.*

It is true that a right to hold property includes a right to enjoy the same and any interference with the right of enjoyment will tantamount to interference with the right to hold property under Article 19 (1) (*f*) and (*g*) of the Constitution. But having regard to the pattern of tenancy legislation in the State for nearly half a century, *e.g.*, conferring occupancy rights on ryots in zamindaries by the Madras Estates Land Act and conferring fixity of tenure to verumpattamdars by the Malabar Tenancy Act and providing for fixation of fair rent, and having regard to the State policy as regards the economic pattern of society, the Madras Cultivating Tenants Protection Act, 1955, cannot be said to be opposed to Article 19 (1) (*f*) of the Constitution. It is a reasonable restriction within the meaning of Article 19 (5). The provisions of section 4 of the Act even though it savours of retrospective operation in certain respects, cannot be said to have exceeded the limits of reasonableness and is not repugnant to Article 19 (1) (*f*) of the Constitution and is in the interests of the general public. Nor is the enactment opposed to Article 19 (1) (*g*) and (6) of the Constitution and there is no irrational discrimination between one class of landlords as compared with others.

S. V. Subramaniam, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*), Special Government Pleader (*V. V. Raghavan*), *V. Kumaraswami* and *T. V. Srinivasachari*, for Respondent.

R.M. ——— *Petition dismissed.*

Somasundaram, J. Shaik Abdul Khader *v.* Jaib Begam.
29th November, 1956. Crl. Appeal No. 100 of 1956.

Indian Penal Code, section 499, *Exception* (9)—*Defamation—Imputation on the character of wife by the husband—Muslims—Divorce by husband—Allegation of unchastity in notice—If protected.*

There is no presumption of law in India, as under the English Common Law, that a husband and wife constitute one person for purposes of Criminal Law. Moreover the provisions of section 499, Penal Code and the exceptions to the same are exhaustive and the principles of English Common Law as regards the absolute privilege between spouses cannot be invoked. Hence a wife can complain against her husband and *vice versa* if one defames the other.

No doubt under Exception (9) to section 499 of the Penal Code it is not defamation to make an imputation on the character of another, if it is made in good faith in the interest of the person making it. But under the Muslim Law it is not necessary that a person pronouncing talak should give reasons for the same. Hence where a Muslim husband in pronouncing talak imputes unchastity to his wife, it cannot be said that the imputation of unchastity is necessary in his interest, and as such is not protected by Exception (9) to section 499, Indian Penal Code.

C. Lakshminarain for Appellant.

The Public Prosecutor (*P. S. Kailasam*) for the State.

A. S. Sivakaminathan for Complainant.

R.M. ——— *Fine reduced.*

Rajagopalan, J. Subbiah Ambalam *v.* State of Madras.
7th December, 1956. W.P. No. 376 of 1955.

Madras Public Health Act (III of 1939), *Rules under—Licence-fees for boarding and lodging houses—G.O. No.* 768 *(Health), dated* 29*th March,* 1954*—Graduated scale of revised fees—Validity—Tax and fee—Difference between.*

It is now well settled that a licence-fee is different from a tax and the power of charging licence-fees cannot be used for taxation. A licence-fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or any special measures rendered necessary by the character of that trade, which is sought to be licensed. The question whether a particular fee is reasonable or not has to be decided on the basis whether there is a reasonable relation between fees charged and the services rendered by the Government or local authority.

G.O. No. 768 (Health) dated 29th March, 1954, which increased the scale of fees as regards licensing of boarding and lodging houses, which was a standardised one graduated on the basis of the rental value of the premises, and made a distinction between lodging houses with boarding facilities and those without boarding facilities, the increased fee in the case of the former being nearly three times the fee levied for the latter, is *prima facie* discriminatory and unreasonable. There is no disclosed rational basis for the enhancement of the fee under the G.O. and as such it is invalid.

[Details of services rendered and the evaluation of the same in relation to the increase examined—Basis and principle of apportionment of expenses discussed—Limits of the principle of standardisation pointed out—Graduated scale on the basis of rental value—When will be valid.]

R. Balasubramanian, for Petitioner.

The Special Government Pleader (*V.V. Raghavan*), for Respondent.

R.M. *Rule absolute.*

Panchapakesa Ayyar, J. Ponnuswami Chettiar *v.* Vellaimuthu Chettiar.
7th December, 1956. C.R.P. No. 858 of 1955.

Negotiable Instruments Act (XXVI of 1881), *section* 4*—Promissory note—Name of payee not mentioned but payee described as " son of P "—Validity and enforceability of note—Evidence to prove name of payee—Admissibility—Evidence Act, section* 92, *Proviso* 6.

The absence of the name of the payee in a promissory note will not make the instrument invalid, when the payee was known with certainty even at the time of execution. When the payee is described in the note as " son of P ", and a particular son of *P* is known to have lent the amount to the maker, though his name is not mentioned in the note (perhaps by sheer slip or accident), the instrument cannot be held to be invalid or unenforceable. Section 92, proviso 6 of the Evidence Act would apply to the case and evidence regarding the name of the payee can be let in, when the description is defective.

33 C.L.J. 132, followed.

To say that the name of the payee must always be mentioned to make a promissory note valid, is not sustainable in any modern Court of justice, equity and good conscience.

B. V. Viswanatha Ayyar and *K. Tiruvenkatachariar,* for Petitioner.

P. Muthukumaraswami Mudaliar and *P. Venkatachalapathi,* for Respondent.

P.R.N. *Petition dismissed.*

Rajamannar, C.J. Nagamanicka Chettiar *v.* Nallakannu Servai.
13th December, 1956. C.R.P. No. 240 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (a) *(iii)—Requirement of non-residential building by a landlord for his business—Scope of.*

The principle of section 7 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act, which provides for a landlord requiring additional accommodation for the purposes of a business he is carrying on, may well apply to cases arising under section 7 (3) (*a*) (*iii*) of the Act also. Where a landlord is carrying on business in camphor in a rented building requires his own building for installing a power-driven machinery for manufacturing camphor, which could not be done in the rented building, even though there may be no threat of eviction from the rented building and there is no question of additional accommodation, it is a case of a landlord requiring accommodation necessary for carrying on his business with the aid of power-driven machinery and he is entitled to maintain an application for eviction of the tenant.

(1955) A.W.R. 695, followed.

M. R. Narayanaswamy, for Petitioner.

R. Ekambaram, for Respondent.

R.M. ——— *Petition allowed.*

Ramaswami, J. Kalianna Goundan *v.* Kolandayammal.
13*th December*, 1956. Appeal No. 1074 of 1953.

Hindu Law—Maintenance—Unchaste woman—Starving maintenance—Allowance of—Principles governing.

It is true that Hindu Law texts provide that an unchaste woman, who really feels contrite and purifies herself by return to the path of virtue and adheres to a moral life for a considerable length of time, may be given a reduced maintenance which will keep body and soul together. But this does not mean that unchaste women, who are no longer capable of pursuing their immoral life as a result of age or other circumstances should be given a bare or starving maintenance.

T. Krishna Rao, for Appellant.

Respondent not represented.

R.M. ——— *Appeal allowed.*

Rajagopalan, J. Krishnamurthi *v.* R.D.O., Salem.
17*th December*, 1956. W.P. No. 234 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 3 (3)—*Requisition of a building for purposes of allotting to Government servant already in occupation of a building—Validity—Notice of requisition—Form of—Need to adhere to statute.*

Where a Government servant is already in occupation of a house and could not be evicted therefrom having regard to the protection afforded to him by the Madras Buildings (Lease and Rent Control) Act, the requisition of another house under section 3 (3) of the Act for allotment to him is bad in law.

(1955) 1 M.L.J. 454, followed.

In such cases only the exercise of the jurisdiction under section 3 (3) is vitiated. So that in cases where a house is validly requisitioned and is allotted to such a person on the ground of convenience or lower rent, etc., the validity of the order of allotment may not be open to objection.

The validity of a notice of requisition under section 3 (3) does not depend on its form or the specific words used. But it is desirable to conform even to the form of the statutory provisions in such cases.

R. Ramamurthi Ayyar, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. ——— *Rule absolute.*

Panchapakesa Iyer, J. Union of India *v.* Punamchand.
18*th December*, 1956. C.R.P. No. 540 of 1955.

Indian Railways Act (IX of 1890), *section* 75 *and Schdedule II, clause* 11—*'Sun-glasses'—If articles made of glass.*

The mere fact that 'sun-glasses' are called glass will not make it an article made of glass within the meaning of clause 11 of Schedule II, to the Railways Act and as such impose an obligation on the consignor to declare its value and content under section 75 of the Act. 'Sun-glasses' are not necessarily made of glass but may be of other material like mica or plastic. Moreover, in order to attract the operations of section 75 of the Act the articles consigned should themselves be made of glass and not merely that there is some glass used in some part of the articles.

Messrs. John and Row, for Petitioner.

V. Venkataseshayya, for Respondent.

R.M. ——— *Petition dismissed.*

Rajagopalan and Rajagopala Ayyangar, JJ. Nachiappa Chettiar *v.* C.I.T., Madras.
19*th December*, 1956. R.C. No. 81 of 1953.

Indian Income-tax Act (XI of 1922)—*Assessable income—Property of debtor taken by a money-lender with an understanding that out of the rents and profits of the property or the sale of certain items the debt should be adjusted and the rest of the property reconveyed to the debtor after full adjustment of debt—Value of reconveyed property—If loss in money-lending business.*

Quaere.—Where a money-lender during the course of his money-lending business and in realisation of the amounts due to him obtains a conveyance of the properties belonging to his debtor in full satisfaction of his debt can it be said that the properties so acquired became the stock-in-trade of the money-lending business ?

Where in such a transaction in a suit by the debtor against the assessee-money-lender it is decided by a Court that the real nature of the transaction was not an out and out sale but is only a sale by which the assessee is placed in possession of the properties of the debtor in order that out of their rents and profits and the sale proceeds of certain items, if any, he should pay and adjust the amounts owing to him from the debtor and the surplus properties should be reconveyed to the debtor, the real owner, the assessee cannot go behind the judgment of the Court and impute to the transaction an effect contrary to that which the Courts have attributed to it. In such cases the reconveyance effected in pursuance of the decree of Court cannot be treated as loss in the money-lending business as the properties acquired cannot be deemed to be part of the assets of the money-lending business. But where the assessee was obliged to refund a certain amount to the debtor, which he originally appropriated to the debt on an erroneous calculation, such amount will be admissible deduction.

R. Kesava Ayyangar and *K. Parasaran*, for Petitioner.

C. S. Rama Rao Sahib, for Respondent.

R.M. *Answered accordingly.*

Rajagopalan and Rajagopala Ayyangar, JJ. East India Industries *v.* C. I. T., Madras
19*th December*, 1956. R.C. No. 90 of 1953.

Indian Income-tax Act (XI of 1922), *section* 10 (2) (*iii*)—*Permissible deduction—Assessee company paying interest on capital borrowed for business—Share-holders of a company lending money to the assessee company for its business—Rate of interest depending on dividend declared—Interest if allowable as permissible deduction.*

Where money is borrowed by a company for capital to carry on its business, the interest paid on such borrowed amount is a permissible deduction under section 10 (2) (*iii*) of the Income-tax Act. The mere fact that the amount was lent by a certain number of share-holders and not by an outsider, does not make any difference so long as the transaction was genuine and the relationship between the lender share-holder and the company was one of creditor and debtor. By a duly passed resolution of the assessee company moneys were borrowed for the business of the company from its share-holders on the stipulation that a minimum rate of 6 per cent. interest would be paid thereon or the same rate of interest as the dividend declared for the period, whichever was higher. The company declared a dividend of 10 per cent.,20 per cent. and 12 per cent. for the relevant years of account and they paid interest at the corresponding rates on the loans borrowed from the share-holders and claimed the same as a permissible deduction under section 10 (2) (*iii*) of the Act.

Held, there is no warrant for holding that anything more than 6 per cent. interest on moneys borrowed is not a permissible deduction. That the stipulated rate of interest is variable and is made dependent on the rate of dividend declared by the company in the relevant year does not alter the nature of the transaction and make it anything other than a loan. Such a payment of interest cannot be called an allocation of profits. It is the quality of the payment that is the test and not its admeasurement.

M.—N R C

Where a company receives money from a member, which he was under no obligation to pay as a member and undertakes to return it with interest which they were under no obligation to return to him as a member, then the payment made cannot be described as a payment made to a member in his character as member.

S. Swaminathan for Applicant.

C. S. Rama Rao Sahib, for Respondent.

R.M. ——— *Answer in favour of assessee.*

Rajagopalan and Rajagopala Iyengar, JJ.
20th December, 1956.

Gordon Woodroffe Co. *v.* C.I.T., Madras.
R.C. No. 85 of 1953.

Indian Income-tax Act (XI of 1922), *section* 10 (2) (*xv*)—*Permissible deduction under—Payment of a lump sum to an employee at the time of retirement—If expenditure of a capital nature—When a permissible deduction.*

An expenditure which does not bring into existence any asset for the enduring benefit of the business of the assessee but is only a lump sum payment to an employee who is retiring from the services of the assessee, in recognition of his past services, may, in the circumstances, be of a revenue nature. But in order to claim such expense as a permissble deduction under section 10 (2) (*xv*) of the Income-tax Act, it should be shown that the expenditure was wholly or exclusively for the assessee's business and the mere fact that it was not of a capital nature is not enough.

A pension or other allowance paid to a Director or employee of a firm solely in respect of the past services of the person concerned will be a permissible deduction only if it is made in the future interests of the business. There must be a connection between the purpose of the payment and the further pursuit of gain in the business in the sense that the payment was designed in the future interest of the business either to act as an incentive to the employee still in service, or to act as an incentive to employees to be recruited in future, (*e.g.*), accepting a lower salary in the expectancy of getting a gratuity on retirement. If the actual object of such payment is the conduct of the business on a profitable basis, with due regard to economy, then if the expenditure is not of a capital nature, it may be a permissible deduction. A payment of gratuity to a retiring employee in recognition of his past services, with nothing more, cannot satisfy the conditions of section 10 (2) (*xv*) of the Act and is not a permissible deduction.

M. Subbaraya Ayyar, V. Sethuraman and *S. Padmanabhan*, for Petitioner.

C. S. Rama Rao Sahib, for Respondent.

R.M. ——— *Answer accordingly.*

Ramaswami, J.
2nd January, 1957.

Public Prosecutor *v.* Karuppiah Konar.
Crl. Appeal Nos. 211 and 212 of 1956.

Madras District Municipalities Act (V of 1920), *sections* 249 (5) *and* 321 (7) *and* (11) —*Effect of.*

Under the scheme of the District Municipalities Act all persons carrying on a business which requires a licence, should submit a renewal application for such licence within the prescribed time before the expiry of the prior license and with the prescribed fee. If the application is made in time, but no reply is received, the applicant can continue to carry on the business as if the license has been renewed. But section 321 (11) of the Act will not help persons who have not made an application for renewal within the prescribed time under section 249 (5) of the Act. In cases where the time granted for renewal application has expired and the period of the original licence has also expired, the person will be deemed to be without a license under section 321 (7) of the Act and is liable to be prosecuted.

The Public Prosecutor (*P. S. Kailasam*) in person.

T. R. Ramachandran, for Accused.

R.M. ——— *Appeals allowed.*

[SUPREME COURT.]

N. H. Bhagwati, T. L. Venkatarama Ayyar,
B. P. Sinha and S. K. Das, JJ.
22nd January, 1957.

H. J. Leach & Co. *v.*
Ms. Jardine Skinner & Co.
Civil Appeal No. 219 of 1953.

Civil Procedure Code (V of 1908), *Order* 6, *Rule* 17—*Amendment of plaint—When proper—Discreation of Court.*

It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation. But that is a factor to be taken into account in the exercise of the discretion and does not affect the power of the Court to order it, if that is required in the interests of justice.

G. K. Daphtary, Solicitor-General of India, for Appellant.

Banerjee, for Respondent.

G.R. ——— *Appeal remanded.*

[SUPREME COURT.]

S. R. Das, C.J., N.H. Bhagwati
and S. K. Das, JJ.
29th January, 1957.

Kamla Debi *v.* Bachulal Gupta.
C.A. No. 158 of 1953.

Hindu Law—Widow—Alienation—Gift of immoveable property to daughter in fulfilment of promise made before marriage—Validity.

It is the right of a Hindu Widow in possession of the estate of her husband, to make a gift of immoveable property to her daughter as marriage dowry, some time after the marriage, in fulfilment of a promise made before the marriage. Such alienation is valid and binding on the reversioners.

R. Sinha, for Appellants.

H. J. Umrigar, for Respondents.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

N. H. Bhagwati, B. P. Sinha
and J. L. Kapur, JJ.
30th January, 1957.

Ramyed Rai *v.* State of Bihar.
Crl. Appeal No. 104 of 1955.

Criminal Procedure Code (V of 1898), *section* 307—*Scope—Reference—Duty of High Court.*

It is the duty of the High Court, when considering reference under section 307, Criminal Procedure Code, to consider the entire evidence and come to its own conclusion, whether the evidence was such, that it could properly support the version of guilty against the appellant. [As the High Court, in the instant case, erred in considering the arguments in regard to the defect in the charge to the Jury and did not consider the entire evidence, which was on the record before it, the appeal was remanded to the High Court for decision according to law.]

S. P. Verma, for Appellants.

B. K. Saran, for Respondent.

G.R. ——— *Appeal remanded.*

[SUPREME COURT.]

B. Jagannadhadas, S.J., Imam, P. Govinda
Menon and J.L. Kapur, JJ.
30th January, 1957.

Dharmanand Pant *v.*
State of Uttar Pradesh.
Cr.A. No. 50 of 1955.

Criminal trial—Commission to examine witness—When proper.

As a general rule it may be said that important witnesses on whose testimony the case against the accused person has to be established must be examined in Court and the issuing of a commission should be restricted to formal witnesses or such witnesses who could not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case.

In the instant case as the accused had not had a fair trial as the important witnesses in the case should have been examined in the Court, the evidence recorded on commission must be treated as not existing and there should be a retrial.

S. P. Sinha, for Appellant.

G. C. Mathur, for Respondent.

G.R. ——— *Appeal remanded.*

[SUPREME COURT.]

S. R. Das, C.J., N.H. Bhagwati, State of Assam *v.* A.N. Kidwai.
T.L. Venkatarama Ayyar, B. P. Sinha C.A. Nos. 346 to 358 and 359 to 363 of 1956.
and S.K. Das, JJ.
31st January, 1957.

Assam Revenue Tribunal (Transfer of Powers) Act of 1948 *section* 3 (3)—*Validity and Scope.*

Section 3 (3) of the Assam Revenue Tribunal (Transfer of Powers) Act of 1948, is valid and the notification issued by the Governor appointing the Commissioner of Hills Division as the appellate authority for revenue appeals (Assam) was also valid. The Legislature in its wisdom and in the interest of smooth administration has thought fit to assign some of the appellate and revisional powers exercised by the Assam Revenue Tribunal to the High Court and the rest to the authority referred to in section 3(3) of the Assam Revenue Tribunal (Transfer of Powers) Act of 1948.

Laheri, Advocate-General of Assam with *N. Lal*, for Appellants.

N. C. Chatterjee, Advocate for Respondents.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

B. Jagannadhadas, S.J. Imam State of Bihar *v.* Ram Naresh Pandy.
and P. Govinda Menon, JJ. Crl. Appeal Nos. 53 and 54 of 1956.
31st January, 1957.

Criminal Procedure Code (*V of* 1898), *section* 494—*Scope of—Discharge of the accused —Proper procedure and conditions.*

The trial Court must exercise a judicial discretion in granting consent to the discharge of an accused, but the intitiative must be that of the public prosecutor.

The judicial function, therefore, implicit in the exercise of the judicial discreation for granting consent means that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegal reasons or purposes. It cannot be taken to place on the Court the responsibility for a *prima facie* determination of triable issue.

The Advocate-General of Bihar, for Appellant.

J. G. Sethi and *H. J. Umrigar*, Advocate for Respondents.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

T. L. Venkatarama Ayyar, S. K. Das, P.H. Patil *v.* Kalgonda
and P. B. Gajendragadkar, JJ. Shidgonda Patil.
7th February, 1957. C.A. No. 228 of 1953.

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Amendment—When permissible.*

Following its own judgment in C.A. No. 219 of 1953 (*H. J. Leach & Co.* v. *Ms. Jardine Skinner & Co.* dated 22nd January, 1957 the Court allowed an amendment required in the interests of justice after the period of limitation and upheld the judgment of the High Court of Bombay which had held, that the suit be heard by the Trial Court on the basis of the amended plaint.

Isaacs with *Dadachandji*, for Appellant.

Achru Ram, Senior Advocate, for Respondent.

G.R. ——— *Appeal dismissed.*

[SUPREME COURT.]

S. R. Das, C.J., T. L. Venkatarama Ayyar, Sardar Inder Singh *v.*
B. P. Sinha, S. K. Das and B. P. Gajendra- State of Rajasthan.
gadkar, JJ. Petns. Nos. 50, 145, 149, 150, 188, 243, 261,
8th February, 1957. 266 and 362 of 1955 and 205 of 1956.

Rajasthan Protection of Tenants Ordinance, 1949 *and Rajasthan Protection of Tenants Act of* 1954—*Constitutional validity.*

Both the Rajasthan Protection of Tenants Ordinance and the Rajasthan Protection of Tenants Act are valid and the power given therein to the Rajpramukh to extend the life of the Ordinance on its expiry is also valid.

The Court did not agree with the statement of law in (1949) S.C.R. 595: (1949) F.L.J. 225 : (1949) 2 M.L.J. 356 (F.C.) that a power to extend the life of an enactment cannot validly be conferred on an outside authority.

M. M. Tewari, Senior Advocate, *K. R. Chaudhri* and *Ganpat Rai,* Advocates, with him, for Petitioners.

Porus A. Mehta, and *R. H. Dheber,* Advocates for Respondents.

G.R. ——— *Petitions dismissed.*

Rajagopalan and Rajagopala Ayyangar, JJ. Sri Raja Rajeswari Ambal *v.*
13*th December,* 1956. District Board, Tirunelveli.
S.T.A. Nos. 14 and 29 of 1953.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 45 (2) (b)—*Persons entitled to be maintained from the estate or its income—If includes institutions which are to be maintained or supported out of the estate income.*

The claim for maintenance referred to in section 45 (2) (*b*) and other provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act refers only to maintenance or support of natural persons and it does not include amounts payable towards maintenance of property and institutions. Institutions, in whose favour a charge is created over an estate or its income, will only rank as a creditor and would be entitled to a proportionate share of the compensation amount.

V. Seshadri, K. S. Ramamurthi and *K. Hariharan,* for Appellant in S. T. A. No. 14 of 1953.

C. A. Vaidialingam, M. Bhujanga Rao and *T. Ramakrishna,* for Respondent in S.T.A. No. 14 of 1953.

K. Bashyam and *S. Gopalaratnam,* for Appellant in S.T.A. No. 29 of 1953.

C. A. Vaidyalingam and *T. Ramakrishna* for Respondent in S. T. A. No. 29 of 1953.

R.M. ——— *Appeals dismissed.*

Ramaswami Gounder, J. Thiruvengada Mudaliar *v.*
3*rd January,* 1957. Doraiswami Naidu.
C.R.P. No. 424 of 1956.

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), *section* 4—*Applicability and scope.*

The provisions of section 4 (1) of the Madras Indebted Agriculturists (Repayment of Debts) Act which permits an agriculturist-debtor to pay his liability under a decree in certain instalments must obviously refer to decrees passed before the commencement of the Act. In cases of suits filed after the commencement of the Act and those that are pending at the time, the provisions of section 4 (4) of the Act will apply and a debtor should claim the benefits of the Act at the time of the passing of the decree. If a defendant fails to do so, he cannot be allowed to claim the benefits under the Act at the time of execution.

K. Srinivasan and *K. Shanmugham,* for Petitioner.

Inamdar Abdus Salam, for Respondent.

R.M. ——— *Petition allowed.*

Panchapakesa Ayyar, J. Md. Amiruddin *v.* Md. Ibrahim.
4th January, 1957. C.R.P. No. 394 of 1953.

Court-fees—Suit for accounts of a dissolved partnership—Defendant denying partnership with plaintiff—Plaintiff if bound to seek the relief of declaration that he was a partner—Court directing payment of additional Court-fee—Suit withdrawn as settled out of Court and dismissed—Court if still can levy the additional Court-fee and recover it.

Where in a suit for accounts of a dissolved partnership the Plaintiff asserts that he is a partner and does not pray for any declaration as to his status, the mere fact that the defendant denies the plaintiff's status, does not make it incumbent on the plaintiff to seek a declaration that he is a partner. Even in a suit for accounts of a dissolved partnership the Court has power to frame an issue whether the plaintiff is a partner or not.

Where a suit in which the plaintiff has been directed to pay additional Court-fee is settled out of Court and is withdrawn and dismissed the Court has no power to compel the plaintiff to pay the additional Court-fee, even if rightly levied. In the absence of a deliberate evasion, the consequence of non-payment of additional Court-fee is only dismissal of the suit for such default. When once a suit is dismissed, not on merits but for default of payment of Court-fee as directed there is no jurisdiction in the Court to collect the Court-fee by any coercive process. The analogy of pauper suits for which specific provision is made in the Code does not apply to such cases.

R. Gopalaswami Ayyangar, for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*), for State.

R.M. ——— *Petition allowed.*

Somasundaram, J. Public Prosecutor *v.* Jani Batcha.
11th January, 1957. Crl.A. No. 14 of 1956.

City Police Act (III of 1888), section 3—Common gaming house—Meaning of—Actual profit only by way of charges for the gaming materials or building—If necessary.

'Common gaming house' in section 3 of the City Police Act does not require that the person keeping the gaming materials should actually make a profit. So long as the object is to make a gain the fact that sometimes loss is sustained and there is no evidence of profit or gains does not affect the question. Further the expression 'or otherwise how-so-ever' in the definition clearly shows that the profit or gain which the person keeping the house, etc., makes need not only be by way of charge for the gaming instruments or the use of the building or enclosure but also by other means.

The Public Prosecutor (*P. S. Kailasam*) in person.

A. S. Sivakaminathan, M. Narayanamurthy and *S. Pichai*, for Accused.

R.M. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Subbiah Goundar *v.* Rami Goundar.
11th January, 1957. C.R.P. No. 713 of 1955.

Madras Buildings (Lease and Rent Control Act, (XXV of 1949), section 7—Eviction proceedings against the tenant—Compromise out of Court—If could be enforced—Bona fides *of landlord's own requirement—Subsequent facts—How far can be taken into consideration.*

Legislations of the type of the Madras Buildings (Lease and Rent Control) Act, (XXV of 1949) take away the ordinary rights arising from agreement and hence unless there is a specific order by the Court directing a tenant to vacate the premises in his occupation, mere agreement of parties to vacate by a stipulated date will not be of any avail and cannot afford a ground for ordering eviction.

In cases where a landlord who is in occupation of a rented building seeks to evict his tenant from his own building, on the ground that he is himself under orders of eviction and therefore requires his own building, it is not obligatory on him to show that he has resisted the eviction proceedings against himself when there are no reasonable chances of success. In the absence of collusion or *mala fides* a person is at liberty to decide for himself whether to resist a case against him or not.

It is of course true to a certain extent that a Court, in deciding the *bona fides* of a landlord's requirement of his own premises in seeking to evict a tenant, can take note of subsequent events which have happened since the institution of the proceedings. But this rule is limited only to facts that were existing in a a fluid state at the time of the institution of the proceedings, but which have since crystallised into some definiteness. No Court can speculate and take notice of events that have started for the first time subsequent to the institution of the proceedings unless it is an inevitable subsequent fact which takes away the jurisdiction of the Court.

S. Tyagaraja Ayyar and *N. Vanchinathan* for Petitioner.

T. R. Sangameswaran, for Respondent.

R.M. —— *Petition dismissed.*

Ramaswami, J. Palaniappa Chettiar, *In re.*
16th January, 1957. Crl.R.C. No. 1015 of 1956.
(Ref. Case No. 26 of 1956).

Cotton Control Order, 1950—*Expiry by efflux of time—Prosecution under—If could be continued after its expiry.*

The Cotton Control Order, 1950, which was made under the Essential Supplies (Temporary Powers) Act, 1946, has ceased to have operation after 26th January, 1955 and is not saved by the Essential Commodities Ordinance of 1955. Nor does section 6 of the General Clauses Act apply as the Essential Supplies (Temporary Powers) Act, 1946 expired by efflux of time and not by repeal.

V. V. Radhakrishnan for The Public Prosecutor (*P.S. Kailasam*).

V. T. Rangaswami Ayyangar and *K. Kalyanasundaram* for the Accused.

R.M. —— *Reference accepted.*

Rajagopalan, J. Kesava Reddiar *v.* Labour Appellate Tribunal.
17th January, 1957. W.P. No. 637 of 1956.

Industrial Disputes Act (*XIV of* 1947), *section* 2 (k) *and* (s)—*Workmen—Who are.*

A person will be a 'workman' within the meaning of section 2 (*s*) of the Industrial Disputes Act, 1947, if he is employed by the employer, which means that there should be relationship of master and servant and the master should have control over the worker. Unless the persons employed are workmen within the meaning of the Act, there could be no question of any industrial dispute between them and the employer within the meaning of section 2 (*k*) of the Industrial Disputes Act.

S. Ramachandra Ayyar, for Petitioner.

Messrs. Row and *Reddy,* for Respondent.

R.M. —— *Orders quashed.*

Rajagopalan, J. Trichy City Co-op. Bank *v.*
17th January, 1957. Addl. Commissioner for Workmen's Compensation.
W.P. No. 165 of 1956.

Madras Shops and Establishments Act (*XXXVI of* 1947), *sections* 6 *and* 41—*Jurisidiction of appellate authority under—Establishment concerned exempted from the Act—Orders passed under section* 41 *after the exemption—Validity.*

The right of an employee to file an appeal and the jurisdiction of the concerned authority to render a decision, undr section 41 of the Madras Shops and Establishments Act, 1947, is both founded on the statute alone and there is no question of any common law right.

Hence to sustain the validity of an order passed by the Commissioner for Workmen's Compensation under section 41(3) of the Act, the jurisdiction of the Commissioner should exist throughout the proceedings, *i.e.*, both at the time of its institution and at the time of its final disposal. Where during the pendency of an appeal under section 41 of the Act the establishment concerned is exempt from the provisions of the

Act by a notification under section 6 of the Act, the jurisdiction of the Commissioner is taken away by the statutory exemption and any order pronounced by the Commissioner after the date of exemption will be void and without jurisdiction. The fact that the Commissioner had jurisdiction initially to entertain the appeal does not a effect the question as the jurisdiction did not continue till the pronouncement of the order.

S. Ramachandra Ayyar, for Petitioner.

M. M. Ismail for The Special Government Pleader (*V. V. Raghavan*), *K. V. Sankaran* for *S. Mohan kumaramangalam*, for Respondents.

R. M. *Rule absolute.*

Panchapakesa Ayyar, J. Janab Mohd. Abdulla *v.* Janab Abdul Sammad.
18th January, 1957. C.R.P. No. 164 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (iv)—*Verbal quarrels with landlord and entertaining on the rented premises persons who are not to the liking of the landlord.*

The fact that the tenant was responsible for verbal quarrels with his landlord is not a sufficient ground for eviction under section 7 (2) (*iv*) of the Madras Buildings (Lease and Rent Control) Act, 1947, Moreover the mere fact that the tenant brought on the rented premises persons whom the landlord did not like or with whom the landlord was not on good terms is not a kind of annoyance which the law can rcognise or remedy and cannot be a ground for eviction.

K. Venkataraman and *Munwar Hussain*, for Petitioner.

N.C. Rangaswami, for Respondent.

R. M. *Petition allowed. Order set aside.*

Rajagopalan and Rajagopala Ayyangar, JJ. Mercantile Agencies *v.*
23rd January, 1957. Raja Bommadevara.
C.R.P. No. 1602 of 1952.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 42—*If bars attachment of the compensation amount in execution of a decree.*

Section 42 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, does not preclude the attachment in execution of a decree of the compensation amount deposited by the Government before the Tribunal after the taking over of an estate. The amount owing to a sharer in the estate is his property and is attachable by others who have claims against the sharer concerned.

L. V. Krishnaswami Ayyar, for Petitioner.

N. C. Raghavachari and the Government Pleader (*C. A. Vaidialingam*), for Respondents.

R.M. *Petition allowed.*

Rajagopala Ayyangar, J. Subramaniam *v.* Courtallam
23rd January, 1957. Township Committe.
S.R. Nos. 791 and 793 of 1957.
W.P. No. of 1957.

Constitution of India, Art. 226—*Practice—Writ of Certiorari challenging separate orders relating to the same property—Need for separate petitions with enclosures.*

In cases where a writ petition is filed under Article 226 of the Constitution challenging certain assessment orders levying property tax for different half years each assessment order or demand furnishes a distinct cause of action. The fact that the assessee is the same does not automatically consolidate the demands into one for purpose of challenge. Hence separate applications with separate vakalats, enclosures, etc., should be filed for each of the cases and mere affixing of the requisite additional Court-fee stamp is not enough. A common affidavit may, however, be used.

R. Ramamurthi Ayyar, for Petitioner.

R.M. *Orders accordingly.*

[SUPREME COURT.]

B. Jaganandhadas, S.J. Imam, P.G. Menon, JJ.
11th February, 1957.

K.N. Mehra v. State of Rajasthan.
Cr. Appeal No. 51 of 1955.

Penal Code (*XLV of* 1860), *sections* 23,24 *and* 379—*Scope.*

Though the ultimate purpose of the flight was to go to Pakistan, the use of the Aircraft for that purpose and the unauthorised and hence unlawful gain for that use to the appellant a cadet in the Indian Air Force and the consequent loss to the Government of India of its (Aircraft) the use can only be considered intentional. This is not by virtue of any presumption, but as a legitimate inference from the facts and circumstances.

As the accused was a young man and a cadet of the Indian Air Force, the sentence of imprisonment was reduced to that already undergone, but sentence of fine of Rs. 750 was upheld.

(1895) I.L.R. 22 Cal. 1017 (F.B.) ; (1890) I.L.R. 15 Bom. 44 ; I.L.R. 41 Mad. 156 : 33 M.L..J. 729 (F.B.), examined and distinguished.

J. G. Sethi, Senior Advocate and *R. S. Narula* Advocate for Appellant.

P. A. Mehta, R. Ganpati Aiyar, and *R. H. Dheber*, Advocates for Respondent.

G.R. —— *Appeal dismissed.*

[SUPREME COURT.]

N. H. Bhagwati, B. P. Sinha and J. L. Kapur, JJ.
14th February, 1957.

Nisar Ali v. The State of Uttar Pradesh.
Cr. Appeal No. 150 of 1956.

Legal maxims—Falsus in in uno falsus in omnibus—*Applicability in India.*

The well known maxim *falsus in uno falsus in omnibus* has not received general acceptence in different jurisdictions in India ; nor has this maxim come to occupy the status of a rule of law.

L.R. (1935) A.C. 462 and Wigmore on Evidence Volume III, para 1009 examined and distinguished.

D. R. Prem, Advocate for Appellant.

T. C. Mathur and *C. P. Lal* Advocates for Respondent.

G.R. —— *Appeal dismissed.*

[SUPREME COURT.]

N. H. Bhagwati, Jagannadhadas, S.J. Imam,
P. G. Menon and J. L. Kapur, JJ.
19th February, 1957.

Asgarli Nazarali Singapore-Wallah. v. State of Bombay.
Cr. Appeal No. 149 of 1954.

Criminal Law Amendment Act, 1952—*Validity—Article* 14, *Constitution of India—Offences under Indian Penal Code—Trial of under the Act—Validity.*

The Criminal Law Amendment Act, 1952, providing for speedier trial of cases of certain offences of bribery and corruptions is *intra-vires* and as all offenders of the same class were treated uniformly under the Act there was no question of any discrimination, and further the classification was not unrelated to the object of obtaining a more speedy trial of offences relating to bribery and corruption.

(1955) 1 S.C.R. 1045 : 1955 S.C.J. 163, relied on.

Accordingly the appeal was dismissed and the case remanded for retrial to the Court of the Special Judge for disposal, according to law.

S. A. Desai, Advocate for Appellant.

Porus A. Mehta for Respondent.

G.R. —— *Appeal dismissed.*

[SUPREME COURT.]
T. L. Venkatarama Aiyar, S. K. Das V.C.K. Bus Service *v.*
and Gajendragadkar, JJ. R.T.A., Coimbatore.
19th February, 1957.
Civil Appeal Nos. 323 & 324 of 1956.

Motor Vehicles Act (IV of 1939)—*Implied conditions of the renewal of the permit.*

Having regard to the provisions of the Motor Vehicles Act, the assertion of the appellants that their right to permit was an implied condition of the renewal of the permit and the mere cancellation of the original permit by the transport authorities did not affect their right to enjoy the renewed permit which they held, was rejected.

A. V. Sastri, Advocate for Appellant.

C. K. Daphtary (Solicitor-General for India) for Respondents.

G.R. *Appeals dismissed.*

[SUPREME COURT.]
Jagannadhadas, S. J. Imam, P. G. Menon Raghubansh Lal *v.* State of U.P.
and J. L. Kapur, JJ. Criminal Appeal No. 94 of 1955.
20th February, 1957.

Criminal trial—Falsification of accounts—Evidence necessary to show criminal intention and knowledge.

In order to establish the offence it was not only enough to show that the entries were incorrect, but also that they were made with knowledge of their incorrectness and with the intention of causing loss to the complainant. The evidence on record did not show that the appellant had the necessary criminal intention, and consequently the appeal must be allowed and his conviction set aside.

Dadachanjee and *Andley*, Advocates for Appellants.

G. C. Mathur and *C. P. Lal*, Advocates for Respondent.

G.R. *Appeal allowed.*

[SUPREME COURT.]
S. R. Das, C.J., T. L. Venkatarama Aiyar, Bhatnagar & Co *v.* Union of India.
B. P. Sinha, S.K. Das, and Gajendragadkar, JJ. Petition No. 423 of 1956 and
21st February, 1957. C.M.P. No. 87 of 1957.

Imports and Exports (Control) Act, 1947—*Delegated legislative powers to the Government—Defence of India Rules.*

The Imports and Exports (Control) Act, 1947, merely continued the powers under the Defence of India Act. The policy for the guidance of the Government was clearly laid down in that legislation and also governed the Imports and Exports (Control) Act. Consequently there was no excessive delegation of legislative powers. The Government was empowered to frame regulations affecting all imports and the rules regarding import of soda ash were within its powers. The findings of the authorities could not be said to have been based on no legal evidence, merely because it was argued that the facts disclosed a larger number of probabilities in favour of the petitioner than against him.

H. J. Umrigar and *Y. Kumar*, Advocates for Petitioners.

C. K. Daphtary, (Solicitor-General for India) for Respondents.

G.R. *Petition dismissed.*

[SUPREME COURT.]
Bhagwati, Jagannadhadas, S. J. Imam, Kailash Nath *v.* State of U. P.
P. G. Menon and J. L. Kapur, JJ. Petition No 94 of 1956.
22nd February, 1957.

U. P. Sales Tax Act—Cloth sold for export—Printing and processing of—If alters its character and makes it liable to sale-tax.

Mere variation of the cloth by printing and processing did not alter its character of being the cloth which had been sold for export. On this view the levy of sales tax on such cloth for the year 1953-54 was not according to law.

P. Trikamdas, Senior Advocate, *Dadachanjee* and *Andley*, Advocates with him for Petitioner.

G. C. Mathur and *C. P. Lal*, Advocates for Respondents.

G.R. *Petition allowed.*

Rajagopalan, J.
8th January, 1957.

Kannan *v.* Secretary, Regional Transport Authority.
W.P. No. 928 of 1956.

Motor Vehicles Act (*IV of* 1939), *section* 48 (c) *and rules* 134-*A and* 269—*Power of Regional Transport Officer to grant additional trips—Scope and extent.*

The number of trips which a holder of a route permit is authorised to make falls within the scope of section 48 (*c*) of the Motor Vehicles Act and rule 134-A (2) of the rules made under the said section. Rule 269 of the rules does not either in express terms or by necessary implication exclude the power to fix the number of trips. The Regional Transport Officer has jurisdiction to fix the number of trips and to fix the timings for each of those trips.

T. Chengalvarayan for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) *S. Mohan Kumaramangalam* and *S. Palaniswami* for Respondents.

R.M. ——— *Petition dismissed.*

Ramaswami Gounder, J.
9th January, 1957.

Kannappa Chettiar *v.* Manickkam Chettiar.
A.A.O. No. 267 of 1955.

Code of Civil Procedure (*V of* 1908), *Order* 21, *rules* 11 *to* 14—*Execution of a decree—Step-in-aid—Application for drawing money in Court deposit—If a step-in-aid—If would save limitation.*

Though an application supported by a sworn affidavit is not in form a verified execution petition, still it could be taken to constitute an execution petition as it satisfies all the requirements of rules 11 to 14 of Order 21, of the Code of Civil Procedure. Hence an application for drawing out money in Court deposit will constitute a step-in-aid of execution for purposes of calculating the period of limitation. Nor is it necessary that there should be a prayer for attachment to constitute such an application an execution petition. In an application for payment out of money in Court deposit, the prayer for attachment is implicit. But an application to draw monies unrelated to the decree will not save the limitation for purposes of execution of that decree.

35 M.L.J. 575, followed.

48 M.L.J. 506 and A.I.R. 1931 Nag. 154, distinguished.

M. S. Venkatarama Ayyar for Appellant.

A. B. Nambiar for Respondent.

R.M. ——— *Appeal dismissed.*

Ramaswami Gounder, J.
10th January, 1957.

Nagamani Achi *v.* Alamelu Achi.
C.R.P. No. 1118 of 1956.

Indian Income-tax Act (*XI of* 1922), *section* 54—*Confidential documents under—Assessment orders and returns of the assessee—Admissibility in evidence—If barred.*

Section 54 of the Indian Income-tax Act relating to the confidential nature of certain documents relating to tax assessment of an assessee, is not concerned with the admissibility of the documents, but only provides that the Income-tax Department cannot be compelled to produce those documents into Court. But if those documents are available before the Court, then the question whether they are admissible in evidence or not has to be determined with reference to the provisions of the Evidence Act. The protection afforded by the section is for the benefit of the assessee and while it is open to an assessee to waive the benefit, a Court cannot compel him to produce the confidential documents into Court. Neither the Income-tax Department nor an assessee can be compelled to produce the documents covered by section 54 of the Act.

A. Sundaram Ayyar and *R. M. Muthuveerappan* for Petitioner.

R. Gopalaswami Ayyangar for Respondent.

R.M. ——— *Petition dismissed.*

Rajamannar, C.J., and
Panchapakesa Ayyar, J.
21st January, 1957.

Salmani, *In re.*
C.M. P. No. 426 of 1957.
W.A. No. 14 of 1957.

Civil Service Regulations (Madras)—Regulation 470 (b)—*Pension of a Government Servant—If could be reduced as a punishment.*

Government has a right to reduce the pension of its servant even as a punishment for valid reasons, as for instance that his service has not been satisfactory throughout. When once charges have been framed against a Government servant when in service and he has been given opportunity to make his representation, they could be continued even after his retirement and if proved the Government can reduce the pension payable to the Government servant concerned as a punishment.

R. M. Seshadri for Petitioner.

R.M. ——— *Petition dismissed.*

Ramaswami Gounder, J.
22nd January, 1957.

Chinna Thirumalai Naidu *v.*
Chellapathi Naidu.
C.R.P. No. 1615 of 1956.

Madras Cultivating Tenants Protection Act (XXV of 1957)—*Power of Revenue Divisional Officer to set aside* ex parte *orders.*

Ordinarily, in the absence of any specific provision in a Statute, a Court or authority has no power to set aside *ex parte* orders passed by it. Hence a Revenue Divisional Officer acting under the Madras Cultivating Tenants Protection Act has no power to set aside *ex parte* orders passed by him and restore the application for being re-heard. Rule 8 of the rules framed under the Act specifically provides for the application of the Code of Civil Procedure only for certain purposes. It does not empower the officer to set aside *ex parte* orders made by him.

N. C. Raghavachari for Petitioner.

G. R. Jagadisan for Respondent.

R.M. ——— *Petition dismissed.*

Panchapakesa Ayyar, J.
25th January, 1957.

Vedachalam *v.* Kanniah.
C.R.P. No. 194 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949) *section* 7 (2) (ii) (a) *and* (b)—*Sub-letting and different user—Watchman of a non-residential building sleeping and eating thereon—If amounts to different user—Tenant being partner of another business—Selling the goods of the partnership business along with his—If amounts to sub-letting—Scope of provision.*

In a non-residential building, where a servant has to stay throughout as a watchman, it is natural that the watchman will have to eat and sleep on the premises. This cannot be a reason for eviction of the tenant on the ground of waste or different user. If food is cooked on the premises and walls are damaged, etc., different considerations would prevail.

Where a tenant with a view to expand his business enters into partnership with others in another like business and sells the goods of that partnership also along with his, there is no contravention of the rule against sub-letting under the Act. It will be, of course, a different matter if the tenant diverts the premises to a totally different use. But this does not mean that the tenant can bring on the premises unconnected persons and allow them to trade therein and receive rents from them either as rents or as profits.

V. Tyagarajan and *K. Srinivasan,* for Petitioner.

Subramaniyan, Rajagopal and *K. G. Manickavasagam,* for Respondent.

R.M. ——— *Case remanded.*

Rajagopalan and Rajagopala Ayyangar, JJ.
25th January, 1957.

The Indian Insurance, etc. Company, Ltd. Salem *v.* Paramasiva Mudaliar.
L.P.A. No. 91 of 1956.

Transfer of Property Act (IV of 1882), *sections* 8 *and* 70—*Accession to mortgage property—Sale of immoveable property—Fixtures—When pass with the property.*

In cases of sale of immoveable property in execution of a mortgage decree, the question of what fixtures pass to the purchaser will be a question of fact in each case to be decided in the light of various facts. The tests to be applied to determine what constitutes an accession to mortgage property under section 70 of the Transfer of Property Act are not very different from the tests to determine what passes on transfer under section 8 of the Act. The English rule as to fixtures does not in terms apply to India and the matter has to be determined on the intention of the parties as gathered from the deed of mortgage.

As regards fixtures it may be in certain circumstances, machinery existing on the mortgaged premises on the date of the mortgage and even machinery subsequently installed thereon, may pass under the mortgage. But it is not always possible to treat the machinery brought on a premises as an accession. The degree of annexation, *viz,* whether they are permanently attached or merely screwed on and the purpose for which they are brought on the premises, *viz.,* whether for the use of the building as such or for the use of the building for some specified purpose unconnected with the building as such *e.g.* as a theatre, will be the relevant factors for consideration in such cases. Where a building subject to a mortgage, in which a particular business like distillery or theatre, etc., are carried on, is sold in execution of a mortgage decree, what the purchaser will get will be the building only and not the fixtures or accessions which are used for the business alone and has nothing to do with the beneficial enjoyment of the building. The position would be different when the sale is of the business as a going concern with the building or the sale is of the building with the machinery and fixtures, etc.

Another way of approach will be to see whether the mortgagee during the course of the mortgage could have insisted on the mortgagor using the premises in a particular way or for a specified purpose.

R. Ramamurthi Ayyar for Appellant.

D. Ramaswami Ayyangar and *P. R. Varadarajan* for Respondent.

R.M. ——— *Appeal dismissed.*

Ramaswami, J.
25th January, 1957.

Munuswami *v.* Viswanatha Nair.
C.M.P. No. 4380 of 1956.
C.R.P. No. 665 of 1956.

Code of Civil Procedure (V of 1908), *section* 60—*Wages and bonus of a workman—Exemption from attachment—Scope of.*

Wages are the personal earnings of labourers or artisans and its characteristics are that they are paid usually for mechanical or manual labour at short stated intervals, as distinguished from salaries are fees. A 'bonus' on the other hand is ex-gratia payment of an employer to an employee over and above the wages or salary. It is a cash incentive given conditionally on certain standards of attendance and efficiency being attained. It is not a regular part of the wages generally. But under special statutes or by agreement, even a bonus can assume permanency and become part of the wages.

The exemption from attachment granted under section 60 of the Code of Civil Procedure covers only a limited class of wage earners, *viz.*, labourers who earn their living by personal labour in occupations which require no art or skill or previous education. Hence the bonus payable to a labourer if it does not form part of the wages, is not exempt from attachment under the section.

V. Nagarajan for Petitioner.

M. S. Venkatarama Ayyar for Respondent.

R.M. ——— *Petition dismissed.*

Rajagopalan, J. Ramaswami Mudaliar *v.* Vannur Panchayat.
30th January, 1957. W.P. No. 613 of 1956.

Madras Village Panchayats Act (X of 1950)—*Rules for levy and collection of property-tax in a panchayat—Rule* 2 (a)—*Power of Panchayat to revise an assessment—Scope of.*

Under the scheme of the rules framed under the Madras Village Panchayats Act relating to the assessment and collection of property-tax it is only the executive authority that has to take the initiative in levying the tax for the first time. The Panchayat is only a revising authority and it is only after an assessment has been completed by the executive authority that the Panchayat gets jurisdiction to revise that assessment. If there is no initial levy by the executive authority the panchayat has no jurisdiction to act under Rule 2 (*a*) of the Rules. Even the revisory jurisdiction of a panchayat under this rule can be exercised only after notice to the assessee.

D. Suryaprakasa Rao and *R. D. Indrasenan*, for Petitioner.

R. Thirumalaiswami Naidu, for Respondent.

R.M. ——— *Rule absolute.*

Somasundaram and Basheer Ahmad Sayeed, JJ. Kandaswami Goundar, *In re.*
1st February, 1957. R.T. Nos. 123 and 650 of 1956.

Code of Criminal Procedure (*V of* 1898), *sections* 342 *and* 342-*A—Co-accused—When a competent witness against other accused—Scope and nature of disability—Benefits of section* 132, *Evidence Act—If could be claimed—Case against co-accused separated—If could be a witness in the case against the other accused.*

Where a prosecution originally laid against two accused is subsequently split up and separate trials had been ordered for different offences there could be no legal impediment in the way of each of the two persons being a competent witness in the case against the other. The mere fact that he was orginally a co-accused does not require that he should be tendered pardon under section 337 before he could become a competent witness. When once the case has been split up and separated he is no longer a co-accused and there is no issue to be tried between him and the State so far as that case is concerned and the disability to be examined on oath as a witness ceases. The accused referred to in section 342 of the Code of Criminal Procedure means the accused who is under trial and under examination by the Court in the concerned case and does not include a person who might have been originally a co-acused but the case against whom has been separated subsequently and he is only an accused in a different case. Such a person is also entitled to the benefit of section 132 of the Evidence Act.

Section 342-A of the Code of Criminal Procedure introduced by the recent amendment seems to contemplate a very special procedure to enable an accused to figure as a witness for himself and for any other accused who may be charged with him at the same time subject of course to the conditions laid down in that section.

Quaere:—How far can such a witness claim the benefit under section 132 of the Evidence Act?

V. L. Ethiraj, *M. Narayanamurthi* and *S. Pichai*, for Accused.

The Public Prosecutor (*P. S. Kailasam*) for State.

R.M. ——— *Order accordingty.*

Rajamannar, C.J., and *Panchapakesa Ayyar, J.* *4th February*, 1957.

State of Madras by Commissioner, Hindu Religious and Charitable Endowments, Madras *v.* Thiruvadamaruthur, etc. Devasthānam.
C.R.P. Nos. 675 and 676 of 1954.

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 103 (e) (*ii*)—*Scheme framed by a civil Court—Provision for approval of Budget by the Court—If valid after the coming into force of the Madras Act XIX of* 1951—*Power of the Commissioner.*

All the powers and duties exercisable by a Court under the provisions of a scheme framed by the Court as regards the administration of a Religious endowment devolved upon the Commissioner for Hindu Religious and Charitable Endowments after the coming into force of the Madras Act XIX of 1951. The power to call for a budget, though vested in the Court under a scheme, vests in the Commissioner after the commencement of the Act and the Civil Court has no jurisdiction to call for or approve a budget . After the coming into force of the Act the trustee should submit the budget only to the Commissioner and not to the Court. They cannot however be called upon to submit the budget to both the Court and the Commissioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and The Government Pleader (*C. A. Vaidialingam*) for Petitioner.

K. Rajah Ayyar, K. Raghavachariar and *V. Seshadri* for Respondent.

R.M. ——— *Orders accordingly.*

Ramaswami, J. *5th February*, 1957.

Krishnaswami Iyengar *v.* Veeranna Chetty.
Crl.Rev.C. No. 849 of 1956.
(Crl.Rev.Pet. No. 788 of 1956.)

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *sections* 22 *and* 87 *and rule* 4 (2)—*Disqualification of being appointed a trustee and effect—Scope—Validity of orders under section* 87—*When affected—Pendency of Civil suit—If a bar.*

Rule 4 (2) of the Rules framed by the Government under section 100 (*g*) of the Madras Hindu Religious and Charitable Endowments Act, 1951, relating to the age limits of officers and servants of the department cannot apply to the age limits of trustees which is governed by section 22 of the Act.

It is true that a person past 70 years cannot be appointed or hold office as a trustee of a religious institution. But the fact that a trustee validly appointed has attained the age limit and becomes disqualified to hold the office does not affect the validity of proceedings under section 87 of the Act. If a trustee is validly appointed on the date of appointment, it is sufficient for purposes of section 87. The mere pendency of a civil suit regarding the rights under dispute does not in any way affect the jurisdiction of a Magistrate to enquire into the matter or putting the trustee in possession of the properties of a religious institution in pursuance of a certificate under section 87. Only persons other than a trustee or servants who are claiming in good faith to be in possession of the property are exempt.

D. R. Krishna Rao, for Petitioner.

R. Sundaralingam, for Respondent.

V. V. Radhakrishnan for The Public Prosecutor (*P. S. Kailasam*) for State.

R.M. ——— *Petition dismissed.*

Panchapakesa Ayyar, J. *8th February*, 1957.

Ramaswami Chettiar *v.* Karumuthu Sivalingam Chettiar.
C.R.P. No. 1694 of 1956.

Code of Civil Procedure (*V of* 1908), *section* 92 *and Order* 1, *rule* 10—*Parties to a suit under—' Persons interested '—Meaning of.*

A lessee of certain trust properties, involved in a suit instituted by persons interested in the trust after obtaining the sanction necessary under section 92 of the Code of Civil Procedure , will also be a person interested in the subject-matter of the suit within the meaning of the section and can apply to the Court to be added as a co-plaintiff. It is not always necessary that the person interested should be a beneficiary under the trust. Even a person who is entitled to take advantage of the benefits of the trust will be an interested person within the meaning of this section.

(Case-law considered and terms explained).

M. S. Venkatarama Ayyar for Petitioner.

P. S. Chandrasekhara Aiyer and *P. S. Ramachandran* for Respondent.

R.M. —— *Petition dismissed.*

Somasundaram, J.
8th February, 1957.

Khader Basha. *In re,*
Crl. Rev. C. No. 1074 of 1956.
Crl. Rev. P. No. 1007 of 1956.

Madras City Police Act (*III of* 1888), *section* 49-*A* (1)—*Keeping a common gaming house*—*Search warrant to search the premises alleged to be used for cotton betting*—*Need to prove specifically that cotton betting was carried on.*

Section 49-A (1) of the Madras City Police Act mentions several classes of bettings or gaming in which a person keeping a common gaming house could trade. A person who goes to bet can do so for any one of the several purposes mentioned in the section. Where in pursuance of a search warrant issued in respect of betting on New York cotton prices on a particular premises a raid is made and materials are recovered, the prosecution should establish not merely that betting slips were recovered but should also establish that the slips were used for the particular betting for which the warrant was issued. Where betting slips are recovered through a decoy sent by the police it should be established that the decoy did bet specifically on the game for which he was sent to bet.

S. Govind Swaminadhan and *P. N. Menon* for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) for the State.

R.M. —— *Conviction set aside.*

Rajamannar, C.J., and
Panchapakesa Ayyar, J.
12th February, 1957.

The Rayala Corporation Ltd. *v.*
Syed Bawker and Co.
C.R.P. Nos. 270 to 274 of 1956.

Madras Buildings (*Lease and Rent Control*) *Act* (*XXV of* 1949), *sections* 4 *and* 12-E *and Rule* 24 *of the Rules*—*Power of controllers to issue subpoena to witnesses other than public servants*—*Fixation of fair rent*—*Criterion.*

Though generally the Controllers appointed under the Madras Buildings (Lease and Rent Control) Act are persons belonging to the Judicial service, they are not Courts and the proceedings before them will not be governed by the provisions of the Code of Civil Procedure. But having regard to the several provisions of the Act relating to service of summons and hearing of parties, etc., the controllers under the Act or the Appellate Authority have the power to summon witnesses, other than public servants. The summons referred to in rule 24(2) cannot be restricted to summons to the respondents in an application and to public servants. The rule contemplates the issue of summons to private witnesses at the instance of parties. The expression 'require the attendance' in sub-rule (7) of Rule 24 is wide enough to include requiring attendance by summoning. This is also in accordance with justice.

For purposes of a fixation of fair rent under the Act it is no doubt true that there is no provision in the Act which specifically provides for taking into consideration the prevailing rates of rents of buildings in the locality which had been constructed subsequent to 1st April, 1940. But section 4 refers to 'the circumstances of the case' and the prevailing rates of rent of similar buildings at the time of the application will be a circumstance which can be taken into account, especially when there is no reliable evidence as to the 1939-40 rental.

V. C. Gopalaratnam and *L. V. Krishnaswami Ayyar* for Petitioner.

V. Tyagarajan and *M. A. Ghatala* for Respondent.

R.M. —— *Revision allowed—Petitions remanded.*

[SUPREME COURT.]
N. H. Bhagwati, B. Jagannadhadas,
S. J. Imam, P. Govinda Menon and
J. L. Kapur, JJ.
12th February, 1957.

Hansraj Moolji *v.* The State of Bombay.
Cr. Appeals Nos. 93 and 70 of 1956.

Demonitization Ordinance (No. III of 1946), *sections* 4 *and* 7*—Operation of—Government of India Act,* 1935, *Ninth Schedule—Reserve Bank of India Act (II of* 1934), *sections* 26 *and* 26-*A—Scope.*

The Demonitization Ordiance, 1946, was in operation on 11th July, 1953, the date on which the offence was committed and the appellants appeal against his conviction by both the Courts below was dismissed.

Purshottamadas Tricamdas, Senior Advocate with *J. B. Dadachandji,* Advocate, for Appellants.

C. K. Daphtary, Solicitor-General of India with *R. D. Dheber,* Deputy Government Advocate, for Respondents.

G.R. *Appeals dismissed.*

[SUPREME COURT.]
S. R. Das, C.J., T. L. Venkatarama Aiyar,
B. P. Sinha, S. K. Das and Gajendragadkar, JJ.
5th March, 1957.

Lilavati Bai *v.*
State of Bombay.
Petn. No. 119 of 1955.

Bombay Land Requisition Act (XXXIII of 1948)*—Order requisitioning property—If violates Article* 14, *Constitution of India—Powers of the High Court to interfere with declaration by the Government.*

As held previously in (1955) 1 S.C.R. 777: (1955) S.C.J. 10, the Bombay Land Requisition Act did not violate any fundamental right and therefore that aspect of the matter cannot be reopened. The provisions of the Act by which finality had been given to the declaration of the Government to decide whether the premises were vacant, did not impinge, on the constitutional powers of the High Court.

H. Hardy, Advocate, for Petitioner.

C. K. Daphtary, Solicitor-General of India with *R. H. Dheber,* Advocate, for Respondents.

G.R. *Petitions dismissed.*

[SUPREME COURT.]
S. J. Imam, P. Govinda Menon,
and J. L. Kapur, JJ.
8th March, 1957.

Hulasi *v.* The State of Uttar Pradesh.
Cr. Appeal No. 206 of 1956.

Penal Code (XLV of 1860), *section* 302*—Circumstantial Evidence—Not sufficient to base conviction on.*

Although there were a number of suspicious circumstances, leading almost to a moral conviction of the guilt of the appellant, yet the principle that the guilt of the accused had to be proved beyond reasonable doubt could not be ignored. [Applying this test, the conviction of the accused could not be upheld and he was acquitted by the Supreme Court of the sentence of death.]

P. S. Safeer, Advocate, for Appellant.

G. C. Mathur, Advocate, for Respondent.

G.R. *Appeal allowed.*

Ramaswami Gounder, J. Jeeyappa *v.* Srinivasan.
24th January, 1957. A.A.A.O. No. 68 of 1956.

Madras Agriculturists Relief Act (*IV of* 1938), *section* 19-*A—Applicability—Petitioner stating that the debt due has been discharged—If could file a petition under section* 19-*A*.

Section 19-A of the Madras Agriculturists Relief Act would apply only if there is any debt due by any person claiming to be an agriculturist. Where a creditor states that a particular debt has been wiped out by agreement and that there is no subsisting debt, the section has no application. That the debt is stated to be discharged by an agreement to sell and there is the possibility of the agreement being found to be unenforceable and the mortgage debt getting revived makes no difference to the legal position.

(1951) 2 M.L.J. 629, Foll.

K. E. Rajagopalachari and *K. E. Varadan*, for Appellant.

V. N. Venkatavaradachari, for Respondent.

R.M. *Appeal allowed.*

Rajamannar, C.J. Sankara Pandian *v.*
1st February, 1957. Syed Abdul Rahman.
C.R.P. Nos. 3 and 475 of 1956.

Code of Civil Procedure (*V of* 1908), *Order* 9, *rule* 13—*Restoration of suit decreed* ex parte—*Judgment-debtor filing regular suits for a declaration that the* ex parte *decree was not binding—Suit decreed—Subsequent application by the plaintiff to restore the earlier suit—Maintainability.*

Where a person against whom an *ex parte* decree has been passed filed a suit subsequently for a declaration that the *ex parte* decree is not binding on him and the decree is set aside, the question whether the plaintiff in the original suit could apply for a fresh disposal of his suit will depend on the facts and circumstances of each case. It is neither possible nor desirable to lay down any general rule of universal application. Much will depend on the finding in the subsequent suit and the ground on which the decree has been set aside.

If there is a finding in the subsequent suit that the plaintiff's claim in the original suit is false to his knowledge but has managed to get a decree stealthily, then there is no question of reviving the suit. If on the other hand the original decree is set aside only on the ground of non-service of summons, etc., there could be no impediment in the restoration of the earlier suit.

I.L.R. 10 Bom. 338, differed.

I.L.R. 10 Pat. 516 (F.B.), followed.

S. Sitarama Ayyar and *S. Rajaraman*, for Petitioners.

K. S. Desikan and *K. Raman*, for Respondents.

R.M. *Petition dismissed.*

Ramaswami Gounder, J. Kuppammal *v.* Devendra Iyer.
7th February, 1957. C.R.P. No. 748 of 1956.

Code of Civil Procedure (*V of* 1908), *Order* 21, *rule* 66 (2) (*d*)—*Proclamation of sale—Upset price—Fixation—Valuation of property by judgment-debtor and decree-holder differing—Procedure.*

In cases where the judgment-debtor and decree-holder differ as regards the valuation of the property sought to be sold in execution of a decree, the proper procedure to adopt by the executing Court is to mention both the figures in the proclamation of sale. The Court cannot fix both the figures as the upset price. Nor is the Court bound to hold an enquiry as regards the value and give such valuation in the proclamation of sale.

C. A. Mohamad Ibrahim and *Vittal V. Sowli*, for Petitioner.

M. Natesan, for Respondent.

R.M. *Petition allowed.*

Rajagopala Ayyangar, J.
18th January, 1957.

Rangaswami Naidu *v.* R.D.O., Coimbatore.
W.P. No. 652 of 1956.

Madras Cultivating Tenants Protection Act (*XXV of* 1955)—*Cultivating tenant—Lessee in possession of land appointed Receiver—If could be evicted under the Act for non-payment of rent.*

Where a lessee in possession of certain land is appointed as Receiver by a civil Court in a suit by the lessor for possession and mesne profits and during the pendency of the said suit the Madras Cultivating Tenants' Protection Act, 1955, came into force, it cannot be said that the lessee whose possession is one in his capacity as Receiver, cannot be evicted by the authorities under the Act. The question whether the Tribunal under the Act will have jurisdiction or not has to be considered in the light of the circumstances in which the order appointing the Receiver came to be passed and the extent to which the possession of the lessee-receiver is on behalf of all the parties to the suit. If the lessee is appointed Receiver subject merely to directions of the Court there is no cessation of landlord and tenant relationship between the parties so as to take the tenant out of the definition of cultivating tenants under the Act.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *V. P. Raman*, for Respondent.

R.M. *Petition dismissed.*

Rajagopala Ayyangar, J.
21st January, 1957.

H.H. Srilasri Subramania Pandara Sannadhi *v.* Malayan Samban.
W.P. Nos. 434 and 619 of 1956.

Tanjore Tenants and Pannaiyal Protection Act (*XIV of* 1952), *section* 10 *and Madras Indebted Agriculturists* (*Re-payment of Debts*) *Act* (*I of* 1955), *section* 3—*Mutual effect of the one on the other.*

Section 10 of the Tanjore Tenants and Pannayal Protection Act, 1952, provides for eviction of cultivating tenants on certain specified grounds one of which is default in payment of the rent due. Section 3 of subsequent legislation, Madras Indebted Agriculturists (Re-payment of Debts) Act, 1955, provides that no suit shall be filed against an agriculturist for the recovery of debts as defined by the Act, which includes arrears of rent. But the embargo placed by the later enactment cannot affect the operation of section 10 of the earlier Act as an application under section 10 of the Madras Act XIV of 1952 is not a suit for the recovery of any debt or an application for the execution of any decree within the scope of section 3 of the Madras Act I of 1955.

But section 4 of the later Act which relates to the manner in which decrees have to be executed and provides for payment of a decree debt in instalments is an overriding provision which modifies all existing laws and hence this provision will be applicable to the proceeding before the Revenue Divisional Officers under the earlier Act.

M. Ranganatha Sastri, S. Gopalan and *S. Bhaskaran*, for Petitioner.

The Special Government Pleader (*V. V. Raghvan*) for Respondent.

R.M. *Rule absolute.*

Rajagopalan and Rajagopala Ayyangar, JJ.
22nd January, 1957.

State of Madras *v.* Zakini Bibi.
S.T.A. No. 38 of 1953.

Madras Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 20—*Scope and effect.*

While during the running of a lease created by a landholder in favour of his lessee in an estate, the Government takes possession of the land comprised in the lease by virtue of a notification under Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948, the lessee is not entitled to claim any damages from his lessor or seek to recover it out of the compensation amount belonging to his lessor as all leases are valid subject to the Proviso mentioned in section 20 of the Act.

The Government Pleader (*C. A. Vaidialingam*), for Appellant.

P. S. Balakrishna Ayyar, P. S. Ramachandran and *T. B. Balagopal*, for Respondent.

R.M. *Appeal dismissed.*

Ramaswami Gounder, J.
22nd January, 1957.

Raghava Iyer *v.* Rangaswami Rao.
A.A.O. No. 225 of 1956.

Madras Agriculturists (Re-payment of Debts) Act (I of 1955)—*Agriculturists—Hindu joint family—Member of—When an agriculturist.*

Explanation I to section 2 (*a*) of the Madras Act I of 1955 provides that where a joint Hindu family is an agriculturist every co-parcener shall be deemed to be an agriculturist provided he does not fall under any of the categories specified in sub-clauses (*i*) to (*v*) of the section. But that does not mean that every member of a non-agriculturist joint family should be deemed to be a non-agriculturist even though his share of the total land revenue may fall within the limits fixed by section 2 (*a*) (*i*) of the Act, although the limit is exceeded when the assessment of the family holding as a whole is taken into consideration. To determine whether a member of a joint family is an agriculturist or not his share of the assessment of the joint family lands, together with his other lands, if any, should alone be taken into consideration for purposes of seeing whether the assessment of land revenue exceeds the limit prescribed by the section.

K. Raman and *R. Sitaraman*, for Appellant.

S. Amudhachari and *A. V. Raghavan*, for Respondent.

R.M. *Appeal allowed.*

Rajagopalan, J.
30th January, 1957.

Mohd. Kaseem *v.* Estates Manager.
W.P. No. 664 of 1956.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 12 (b) (ii)—*Claim of a landholder for ryotwari patta.*

In cases where a landlord claims the issue of a ryotwari patta in his favour under section 12 (*b*) (*ii*) of the Madras Act (XXVI of 1948) the onus is on him to prove that he was cultivating the said lands himself since 1st July, 1945. The fact that the landlord purchased the lands subsequent to the said date does not absolve him from proving the requirement of the said sub-section. There is no other provision under the Act under which a landholder can claim statutorily the issue of a ryotwari patta in his name even though his title to the land is undisputed.

In such cases the jurisdiction of the Tribunal under the Act is limited and circumscribed by the provisions of the Act. It may be open to the Government acting outside the provisions of the Act to issue a ryotwari patta to a landholder, whose ownership of the land is undisputed.

D. R. Krishna Rao, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*), for Respondent.

R.M. *Petition dismissed.*

Basheer Ahmed Sayeed, J. Abdul Wahab *v.* Dorairaj.
8th February, 1957. C.R.P. No. 451 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7-*A* (4)—*Order under—Failure on the part of the tenant to pay or deposit rent—Need for enquiry.*

In cases where the Controller or the Appellate Authority under the Madras Buildings (Lease and Rent Control) Act, 1949, acts under the provisions of section 7-A (4) of the Act, the procedure contemplated by the sub-section should be followed, *viz.*, the tenant should be given an opportunity to show cause as to why he was not able to deposit the arrears of rent. In the absence of any enquiry on that point the order will be vitiated.

A. Subramania Ayyar, for Petitioner.

V. S. Rangaswami Ayyangar, for Respondent.

R.M. *Petition allowed.*

Ramaswami, J. Public Prosecutor *v.* Thondiram.
8th February, 1957. Crl. App. No. 304 of 1956.

Madras District Municipalities Act (V of 1920), *section* 245—*Protection under for failure to take out license—Power of criminal Court to inquire if the refusal to grant license is capricious—Goldsmith using a small electric fan instead of bellows for blowing his furnace—If amounts to installation of electric machinery.*

Where a discretion is vested by law in a public body like a Municipality to grant or refuse a license for carrying on a specified trade and in any case where the municipality refuses to grant a license, in a prosecution of the offender for carrying on the trade without such license, criminal Courts before whom the case is launched are entitled to consider whether the discretion vested in the municipality was judiciously exercised and whether the refusal of the licence is in accordance with law.

Quaere.—Where a goldsmith for purpose of his smelting gold in the usual charcoal furnace, instead of the traditional bellows uses a device with the aid of an electric table fan to blow air to the furnace, could it be said that such user is contrary to the provisions of the Municipalities Act or the Public Health Act?

The Advocate-General (*V. K. Tiruvenkatachari*) and *V. V. Radhakrishnan* for the Public Prosecutor (*P. S. Kailasam*), for Appellant.

Mohan Kumaramangalam, K. Hariharan and *C. Ramanathan*, for Accused.

R.M. *Appeal dismissed.*

Rajamannar, C.J. Subulal *v.* Peranna.
8th February, 1957. C.R.P. No. 1307 of 1955.

Code of Civil Procedure (V of 1908), *Order* 8-*A—Applicability.*

The mere fact that there is no privity of contract between the plaintiff and the third party in a claim by a defendant under Order 8-A of the Code of Civil Procedure, is no ground for dismissing the application. Generally speaking such a privity will not exist as in such a case the third party will be a necessary party.

S. M. Cassim and *Mrs. Leela Nawaz,* for Petitioner.

M. R. Narayanaswami, for Respondent.

R.M. *Petition allowed.*

Rajagopalan, J. Paramasivam *v.* Southern Railway.
8th February, 1957. W.P. No. 857 of 1956.

Railway Servants Conduct Rules, Rules 24 *and* 27*—Subsidiary instructions by General Manager contrary to express provisions of the Rules—Validity.*

Rule 24 of the Railway Servants Conduct Rules no doubt prohibit a Railway servant from seeking redress in Courts for the vindication of the public acts or character from defamatory attacks. The proviso to the rule specifically excludes cases of purely private character.

It is true that Rule 27 of the aforesaid Rules empowers the General Manager to issue subsidiary instructions regarding the conduct of Railway servant. But that power which is intended to enable the implementation of the other rules, cannot be invoked to override the rules. Hence the subsidiary instructions by the General Manager, dated 30th April, 1952, which restrict the right of a Railway servant to resort to a Court of Law even in regard to his personal rights is contrary to the express provisions of the proviso to Rule 24 and is therefore invalid.

G. Vasantha Pai and *D. Padmanabha Pai,* for Petitioner.

C. Govindaraja Ayyangar and *C. Sampath,* for Respondent.

R.M. *Rule absolute.*

Somasundaram and Ramaswami Gounder, JJ. Yesudasan *v.* Govindaswami.
14th February, 1957. Crl. R. C. 724 of 1956.
[Crl. R. P. 678 of 1956.]

Criminal Procedure Code (V of 1898), *section* 132*—Scope of—Protection under of police officers while acting under Chapter IX of the Code—Onus of proof.*

The protection conferred by section 132 of the Code of Criminal Procedure will be rendered nugatory if the onus is to be thrown on the police officers to prove in a trial that they acted under the provisions of Chapter IX of the Code, before they could seek the protection of prior sanction of the State Government. If the police officers are able to prove that they were acting in discharge of their duties as public officers in dispersing an unlawful assembly, then they are not guilty of any offence. But this could be gone into only at the trial. But the object of section 132 of the Code is to afford protection to public servants acting in discharge of their duties, from being unnecessarily prosecuted without reasonable cause which is ensured by the insistence of prior sanction of the State Government. The allegations in the sworn statement of the complainant that the concerned police officer acted in excess of his powers cannot by itself take away the protection afforded by the section, *V. T. Rangaswami Ayyangar* and *R. Santanam*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the State.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Complainant.

R.M. *Petition dismissed.*

Rajagopala Ayyangar, J. Sethurajan *v.* Collector of Central Excise.
15th February, 1957. W.P. No. 425 of 1956.

Sea Customs Act (VIII of 1878), *section* 167 (8)—*Protection under.*

A merchant who purchases gold in the usual course of his business *bona fide* from a person offering it for sale, cannot by such act said to aid or abet the commission of any offence under the Sea Customs Act, if it is found later that the gold offered for sale is smuggled contrary to the provisions of the Act. Unless it is proved that the merchant induced and aided or abetted the illegal importation of the gold, mere knowledge on his part that the gold was smuggled will not make his act of purchasing, an abetment of the illegal importation. The act of purchase is long after the importation and cannot constitute the purchaser an accessory before the fact or a person concerned in the offence. Hence the Collector of Central Excise cannot impose a penalty under the Act on such a purchaser.

Nor could the sale price paid by the purchaser be returned to the smuggler when the sale itself becomes rescinded by the order of forfeiture of the smuggled goods.

V. T. Rangaswami Ayyangar and *K. E. Raghavachari*, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*), for Respondent.

R.M. *Rule absolute.*

Rajagopalan and Rajagopala Ayyangar, JJ. Manavikrama Raja *v.*
18th February, 1957. Controller of Estate Duty.
W.P. Nos. 59 of 1955 and 29 of 1956.

Estate Duty Act (XXXIV of 1953), *section* 7 (4)—*Explanation—Holder of an office —Meaning of—Property attached to the holder of an office—Exemption from levy of duty —Holder of a sthanam in Malabar—Exclusion of from the benefit—Validity—If offends the equality clause—Constitution of India* (1950), *Article* 14.

The expression 'holder of an office' in section 7 of the Estate Duty Act has to be understood in its ordinary sense, *viz.*, a person in a position to which certain duties are attached, especially one of a more or less public character.

It is true that a 'Sthanam' in Malabar is described by text writers, lexicographers and jurists as an 'office' and the 'sthani' as the holder of the office of a 'sthanam.' But this is only in the sense of a dignitary as entitling the sthani to certain privileges or precedence in social or religious affairs. It is also well settled that a mere right to an office of honour, without any duties to perform, unrelated to questions of rights in property, is not by itself enforceable by civil Courts.

Though the term 'office' may not be confined only to public offices and may include in certain cases private offices as well, the term "office" within the meaning of section 7 (4) of the Estate Duty Act, whether honorary or paid, is one that involves duties. A sthanam in Malabar is not an office within the meaning of the said section, The English Law concept of a 'corporation sole' or certain other sinecure benefices, generally ecclesiastical, are pure accidents of the historical development of that country and they cannot furnish a basis for holding that in this country also every sinecure private office falls within the expression 'office' in section 7 (4) of the Estate Duty Act. The expression 'corporation sole' in section 7 (4) of the Act would apply to those offices which have been designated as corporation sole by specific statutory provisions. Nor could it be said that a sthani is a trustee and as such the holder of an office within the meaning of the section. Cases of a trustee holding an office so as to claim the exemption under section 22 of the Act are cases of express trust of the character dealt with under the Trusts Act.

Section 7 (4) of the Estate Duty Act is not unconstitutional in so far as it excludes the holder of a sthanam in Malabar from the benefit of the exemption.

M. K. Nambiar, C. Karunakara Menon and *C. Unnikanda Menon,* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and *C. S. Rama Rao Sahib,* for Respondent.

R.M. *Petitions dismissed.*

Rajagopalan, J. Abdul Majeed *v.* State.
19*th February,* 1957. W.P. No. 552 of 1956.

Constitution of India (1950), *Article* 226—Locus standi *to apply under—' Person aggrieved'—Meaning of—Judicial or or quasi-judicial order—Nature of in licensing cases —Madras Rice Mills Licensing Order,* 1955—*Issue of licence—Right of another licence holder to object.*

It is no doubt true that a petitioner seeking the aid of Court under Article 226 of the Constitution of India should be a person aggrieved by the order, the validity of which is challenged. But in cases involving questions as to issuing of licences a statutory right to object to the grant of license may not be the exclusive test to apply in deciding whether an applicant for the issue of a writ is an 'aggrieved person' entitled to challenge the validity of the order which he seeks to avoid. Apart from questions of guaranteed rights under the Constitution, a person would be entitled to invoke the jurisdiction of the Court *ex debito justitiae* if he establishes that the order complained of was passed by an authority which had no jurisdiction at all.

Where a licence to work a rice mill is granted to a person in close proximity to another's and such other person makes representations to the authorities concerned which are considered and overruled, such a person will be a person aggrieved by the order granting the license. That the statutory provision under which the license is granted does not confer any right on a trade rival to object to the issue of the license does not affect the principle.

Where statutory rules prescribe the taking out of a license as a condition precedent to a person engaging himself in a business of his choice, the grant or refusal of the license by the authorities cannot be viewed merely as an administrative order. The nature of the order is determined by the nature of the statutory function and not from the standpoint of any particular party to the proceedings.

G. Ramanujam, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *M. M. Ismail,* for Respondent.

R.M. *Rule discharged.*

Rajagopala Ayyangar, J.
19th February, 1957.

Govinda Menon *v.*
Rent Controller, Coimbatore.
W.P. No. 575 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7(3) (a), *Proviso—Person becoming a landlord by transfer* inter vivos *disabled from applying for eviction of tenant before expiry of three months—Effect of.*

The Proviso to section 7 (3) (*a*) of the Madras Buildings (Lease and Rent Control) Act, 1949 which restricts the right of a landlord from applying for eviction of his tenant before the expiry of three months from the registration of the instrument in case of transfer *inter vivos* is intended for the benefit of the tenants and has nothing to do with the jurisdiction of the Court in the matter of disposing of a petition under section 7 (3) of the Act. A tenant can succeed if he raises the objection; but he can equally waive the benefit and if he does so, the petition is not rendered incompetent and the order is not null and void. In any event the Court which passed the order cannot *suo motu* treat the order as *non est*.

V. P. Raman, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*), for Respondent.

R.M. *Rule absolute.*

Panchapakesa Ayyar, J.
22nd February, 1957.

Hazarath Sayed, etc., Trust *v.*
Ibrahim Sahib.
C.R.P. No. 4 of 1957.

Madras City Tenants Protection Act (III of 1922)—*Right of tenant to apply under the Act for fixing the rental value or for directing the landlord to sell the land to him—Procedure.*

A tenant entitled to the benefits of the Madras City Tenants Protection Act to have the reasonable rent determined or for direction to the landlord to sell the land can initiate the proceedings by an O.P. In cases where before the extension of the Act to the area concerned, parties have settled their rights by a consent decree the effect of an order in an O.P. filed under the Act after its extension to the area, might be to alter the decree. But this does not make any difference as to the procedure to be adopted under the Act.

S. Kothandarama Nainar, for Petitioner.

G. R. Jagadisan, for Respondent.

R.M. *Petition dismissed.*

Rajagopala Ayyangar, J.
25th February, 1957.

Shanmugha Rajeswara Sethupathi *v.* State.
S.R. No. 1751 of 1957.

Constitution of India (1950), *Article* 226—*Petition by trustee for relief in respect of several notifications affecting properties in respect of different trusts—If single petition could be filed.*

A trustee who is aggrieved by certain notifications of the Government as regards the several institutions under his management cannot file a single petition under Article 226 of the Constitution in respect of all the trusts. The mere fact that he is the sole trustee for all the trusts and is entitled to act on behalf of all the trusts or the fact that the points for decision as regards each institution is the same cannot import unity to the right. As the notifications in regard to the properties comprised in each trust is separate and the right of the trustee is in respect of each institution under his management, separate petitions have to be filed.

R. Kesava Ayyangar and *K. Parasaran*, for Petitioner.

R.M. *Office-note accepted.*

Rajagopala Ayyangar, J.
25th February, 1957.

Ganapathi Nadar and Sons *v.* State.
S.R. No. 6186 of 1957.

Constitution of India (1950), *Article* 226—*Petition under—Practice—One petition by several persons aggrieved by a common order—If permissible.*

An application for the issue of an appropriate writ filed under Article 226 of the Constitution of India to canvas the validity of an order of reference for adjudication by the Tribunal under the Industrial Disputes Act, 1947, has to be filed separately by each of the petitioners who are aggrieved by the order of reference. The mere fact that there was a single reference by the Government in respect of the disputes existing in several similar establishments, will not enable them to file a single petition as their grievance against the order of reference cannot be said to have a unity.

T. R. Srinivasan, for Petitioner.

Notice not taken to Respondent.

R.M. *Office-note accepted.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Ramaswami Iyer *v.* Krishnier.
21st January, 1957. L.P.A. No. 17 of 1954.

Madras Debt Conciliation Act (XI of 1936), *section* 14 (2)—*Agreement before Debt Conciliation Board—Registration—Agreement executable as a decree of Civil Court—Limitation for—Limitation Act (IX of* 1908), *Article* 182, *clause* (2)—*Six years' limitation for execution of registered decrees—Applicability.*

Under section 14 (2) of the Debt Conciliation Act an agreement before the Debt Conciliation Board can be registered under the provisions of the Indian Registration Act and on such registration the agreement takes effect as if it were a decree of a Civil Court and is executable as such. But even after registration such an agreement continues to be only an agreement though it is notionally a decree for purposes of execution. The initial agreement does not cease to be an agreement on registration; but the subsequent registration alone makes it executable notionally as a decree. Hence a registration of such an agreement before the Debt Conciliation Board cannot be equivalent to registration of a decree and the registered agreement is not the same as a registered decree of a Civil Court so as to attract the extended period of six years' limitation for execution under Article 182 (2) of the Limitation Act. The normal period of three years alone will apply to cases of execution in such cases.

S. Ramachandra Ayyar, for Appellant.

G. R. Jagadisa Ayyar, for Respondent.

R.M. *Case remanded.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Maniam Hira Gounder *v.*
12th February, 1957. Naga Maistry.
S.A. No. 2032 of 1953.

Partnership—Agreement of partnership involving transfer of licence or permit granted by Government contrary to its provisions prohibiting such transfer—Legality—Motor Vehicles Act, section 59 (1)—*Transfer of permit—Prohibition of—Partnership in lorry business—Validity.*

An agreement of partnership which will entail a transfer of a license or permit granted by the Government, when there is an express prohibition against such transfer, is illegal and void.

Where a penalty is imposed for the contravention of law, it is an indication that the transaction which involves such a contravention is prohibited and therefore illegal. But where there is no penalty imposed, the question whether a contract is illegal or not has to be determined on a consideration of the purpose of the legislation—Whether the prohibition is purely a measure to protect the revenue to the Government or intended to be in the interests of the public, in the later case the contract will be void.

Section 59 (1) of the Motor Vehicles Act expressly prohibits transfer of a permit except with the permission of the transport authority. A partnership in respect of a lorry business which involves the transfer of the route permit will therefore be illegal and void and a suit for dissolution of such partnership and for accounts is not sustainable though the party aggrieved may have his remedies otherwise as against the others.

M. K. Nambiar and *C. F. Louis,* for Appellant.

R. Desikan, for Respondent.

R.M. *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Raman Chettiar *v.* Raman Chettiar.
14th February, 1957. L.P.A. No. 149 of 1953.

Burma Accrual of Interest (Wartime Adjustment) Act (XI of 1942), *section* 3—*Scope and effect.*

The Burma Accrual of Interest (Wartime Adjustment) Act (XI of 1942) gives relief by way of wiping out interest only in respect of certain kinds of liability, *viz.*, liability for interest which accrues or is payable upon any loan or mortgage, other than usufructuary mortgage made in Burma before 5th May, 1942. The benefit of section 3 of the Act cannot be invoked by a debtor unless interest can be held to have accrued or became payable upon any loan or mortgage. Reading the section with the definition of loan in section 2 of the Act, it is plain that interest due and payable under a decree of Court cannot be treated as interest accruing on a loan as defined by the Act. The fact that the decree was passed in a suit for recovery of a loan will not make the liability to pay interest under the decree as a liability flowing from the contract of loan. The award of interest from the date of the decree to the date of payment is not under the contract of loan but in exercise of the power of Court under section 34 of the Code of Civil Procedure.

R. Gopalaswami Ayyangar, for Appellant.

K. S. Desikan and *S. Thiagaraja Ayyar*, for Respondent.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
15th February, 1957.

Workers of Sagar Talkies *v.* Management of Odeon Cinema.
W.A. No. 132 of 1954.

Industrial Disputes Act (*XIV of* 1947), *section* 2—'*Industrial dispute*'—*When could arise*—'*Workmen*'—*Who are.*

Before a dispute can be said to be a dispute between employers and workmen so as to constitute an industrial dispute within the meaning of the Industrial Disputes Act, 1947, the relationship of employers and workmen should be established between the parties. There should be the relationship of master and servant between the parties. It may be that a person once in employment will still continue to be a 'workman' even after termination of the employment. But where there is no initial employment at all a mere contract to employ will not create the relationship of employer and workman within the meaning of the Act.

S. Mohankumaramangalam and *K. V. Sankaran*, for Appellant.

V. C. Gopalaratnam and *L. V. Krishanswami Ayyar*, for Respondent.

The Special Government Pleader (*V. V. Raghavan*) for the State.

R.M. ——— *Appeal dismissed.*

Ramaswami Gounder, J.
18th February, 1957.

Nayana Reddiar *v.* Annamalai Mudaliar.
S.A. No. 781 of 1954.

Practice—*Court sale in execution of a decree*—*Right of other creditors of the judgment-debtor to file a suit to set aside the sale on the ground that the decree in execution of which sale took place is fraudulent*—*Maintainability.*

It is true that section 53 of the Transfer of Property Act which relates to avoidance of fraudulent transfers does not apply to sales in execution of decrees and there is no other specific statutory provision under which such sales could be attacked on the ground of fraudulent collusion between the decree-holder and judgment-debtor.

But that does not mean that a Court is powerless to entertain a suit and grant relief to remedy an injustice, at the instance of a creditor, where a debtor sets up a person to file a suit and obtain a decree and buy his properties in execution thereof.

A civil Court has power in such cases to remedy any injustice and set aside fraudulent Court sales at the instance of the other creditors or decree-holders. It is not the rule that the execution sale could be challenged by the other decree-holders only by putting their decrees in execution. This procedure will lead to unnecessary chaos and multiplicity of proceedings.

K. S. Champakesa Ayyangar and *K. C. Srinivasan*, for Appellant.

V. Seshadri, *K. S. Ramamurthi*, *G. R. Jagadisan* and *T. L. Nagaraja Rao*, for Respondents.

R.M. ——— *Appeal allowed.*

[SUPREME COURT.]

S. R. Das, C.J., T. L. Venkatarama Ayyar, B. P. Sinha, S. K. Das and Gajendragadkar, JJ.
13th February, 1957.

Baij Nath Prasad Tripathi *v.* State of Bhopal.
Pets. Nos. 115 of 1956 and 132 of 1956.

Constitution of India (1950), *Article* 20—*Penal Code* (*LXV of* 1860), *section* 161 *and Preventive Detention Act* (*IV of* 1950), *section* 5—*Offence under—Trials—If hit by Article* 20 *of the Constitution or section* 403 *of the Criminal Procedure Code* (*V of* 1898)—*Criminal Law Amendment Act* (*XLVI of* 1952), *section* 7 (2).

The sentence under section 161 of the Penal Code is three years and under section 5 of the Prevention of Corruption Act is seven years and subsequent trial under the latter Act is sustainable. Article 20 of the Constitution of India and section 403 of the Criminal Procedure Code are not applicable to the case.

A.I.R. 1945 All. 340, not approved.

[A petition under Article 32 was dismissed.].

B. D. Sharma for Petitioners.

C. K. Daphtary (Solicitor-General) with Messrs. *Mehta* and *Dhebar* for Respondents.

G.R. *Petition dismissed.*

[SUPREME COURT.]

N. H. Bhagwati, B. Jagannadha Das, S. J. Imam, P. Govinda Menon and J. L. Kapur, JJ.
7th March, 1957.

Sohan Lal *v.* Union of India.
Crl. App. No. 132 of 1954.

Constitution of India (1950), *Article* 226—Mandamus *and injunction—Issue of—When proper.*

Where a person has apparently entered into *bona fide* possession of a property, without knowledge that any person had been illegally evicted therefrom a *mandamus* will not lie. Resort must be had to injunction or other appropriate proceedings to oust such parties in possession. A *mandamus* will go only on the supposition that there is no body in possession. The principle applicable to an election to an office will apply.

R. v. *Chester Corporation*, 1853 L.J.Q.B. 61, referred to.

R. L. Anand, Senior Advocate with *S. N. Anand* for Appellants.

R. Ganapathy Ayyar, with *Messrs. Mehta* and *Dhebar* and *A. Grover* for Respondents.

G.R. *Appeal allowed.*

[SUPREME COURT.]

N. H. Bhagwati, B. Jagannadha Das, S. J. Imam, P. Govinda Menon and J. L. Kapur, JJ.
7th March, 1957.

State of Kutch *v.* Salat Pragjin Karamshay.
Cr. Appeal No. 33 of 1956.

Bombay Prevention of Gambling Act (*IV of* 1887)—*Applicability to Kutch.*

Without a notification the Bombay Prevention of Gambling Act cannot be held to have been validly applied to the State of Kutch.

The notification issued by the Chief Commissioner of Kutch on 28th November, 1950, was valid and issued under legal authority and the Bombay Public Gambling Act came into force in parts to which that notification made it so applicable.

Messrs. Porus A. Mehta and *Dhebar* for Appellant.

H. J. Umrigar for Respondents.

G.R. *Appeal allowed.*

[SUPREME COURT.]

B. Jagannadha Das, P. Govinda Menon
and J. L. Kapur, JJ.
19th March, 1957.

Digambar Pershad *v.*
State of Hyderabad
(Now State of Mysore).
Cr. A. No. 77 of 1956.

Penal Code (*XLV of* 1860), *sections* 302 *and* 304—*Intention to cause injury likely to cause death—If can be inferred from the injuries.*

Merely from the injuries inflicted it is difficult to find that there was any intention of causing any injury likely to cause death or which could in the ordinary course of nature cause death. In the absence of proof of such intention the accused can only be held guilty of an offence of culpable homicide not amounting to murder.

J. G. Sethi for Appellants.

Porus A. Mehta for Respondent.

G.R. ——— *Appeal partly allowed.*
Sentence reduced.

[SUPREME COURT.]

N. H. Bhagwati, B. P. Sinha and
J. L. Kapur, JJ.
20th March, 1957.

News Papers, Ltd. *v.* The State
Industrial Tribunal, U.P.
C.A. No. 213 of 1956.

Industrial Disputes Act (*XIV of* 1947) *and U.P. Industrial Disputes Act—Scope and object of.*

The Industrial Disputes Act has been devised with the object of maintaining industrial peace so as to prevent interference with public safety and with public order or with the maintenance of supplies and services essential to the life of the community. The Act is based on the necessity of achieving collective amity between labour and capital by means of conciliation, mediation and adjudication.

S. V. Sinha with *S. N. Mukerjee* for Appellant.

G. C. Mathur and *C. P. Lal* for Respondent.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

N. H. Bhagwati, S. J. Imam and
A. K. Sarkar, JJ.
26th March, 1957.

State of Uttar Pradesh *v.*
Mohammad Sayeed.
Cr. A. No. 130 of 1955.

Criminal Procedure Code (*V of* 1898), *sections* 499 *and* 555—*Form of security bond—Bonds in favour of Empress of India—If valid as in favour of Government after India was declared a Republic.*

After India was declared a Republic under the Constitution of India (1950) surety bonds in favour of Empress of India cannot be considered valid bonds by the sureties in favour of the Government.

G. C. Mathur and *C. P. Lal* for Appellants.

Nemo for Respondents.

G. R. ——— *Appeal dismissed.*

[SUPREME COURT.]

N. H. Bhagwati, S. J. Imam and
A. K. Sarkar, JJ.
27th March, 1957.

Swaminatha Odayar *v.*
Official Receiver, W. Tanjore.
C. A. Nos. 252 and 253 of 1953.

Hindu Law—Partition—Award of owelty —If creates charge for same on properties allotted to another member of the joint Hindu family.

When an owelty is awarded to a member on partition for equalisation of the shares on an excessive allotment of immoveable properties to another member of the joint family, such a provision of owelty ordinarily creates a charge or a lien on the land taken under the partition. Even if no charge is created in express terms a lien may exist because it is implied by the very terms of the partition.

K. S. Champakesa Aiyangar and *S. Subramanyam* for Appellants.

Nemo for Respondents.

G.R. ——— *Appeal allowed.*

[SUPREME COURT.]

N. H. Bhagwati, B. Jagannadhadas,
S. J. Imam, P. Govinda Menon, and
J. L. Kapur, JJ.
29th March, 1957.

Amar Singh *v.* Custodian-General
of Evacuee Property.
Petitions Nos. 351 of 1954, 149 of 1956
and 273 of 1955.

Administration of Evacuee Property Act (XXXI of 1950)—*Interest of quasi-permanent allottee—If* "*property*" *within the meaning of Articles* 31 *and* 19 (1) (*f*) *of the Constitution of India.*

It cannot be held that the interest of a quasi-permanent allottee under the Administration of Evacuee Property Act is "property", within the context of that word which would attract the protection of Fundamental rights under the Constitution of India. Such rights of the allottees are recognised in the statutory rules and they constituted the essential basis of a satisfactory rehabilitation and settlement of displaced landholders until such time as they obtain sanads to the land.

N. S. Bindra, Senior Advocate, with *S. Gopal Singh* for Petitioners.

Porus A. Mehta and *K. L. Mehta* for Respondents.

G.R. *Petitions dismissed.*

Somasundaram and Basheer Ahmed Sayeed, JJ.
1st February, 1957.

Kandaswami Goundar, *In re.*
R.T. Nos. 123 and 650 of 1956.

Criminal Procedure Code (*V of* 1898), *sections* 342 *and* 342-*A*—*Co-accused—When a competent witness against other accused—Scope and nature of disability—Benefits of section* 132, *Evidence Act—If could be claimed—Case against co-accused separated—If could be a witness in the case against the other accused.*

Where a prosecution originally laid against two accused is subsequently split up and separate trials had been ordered for different offences there could be no legal impediment in the way of each of the two persons being a competent witness in the case against the other. The mere fact that he was orginally a co-accused does not require that he should be tendered pardon under section 337 before he could become a competent witness. When once the case has been split up and separated he is no longer a co-accused and there is no issue to be tried between him and the State so far as that case is concerned and the disability to be examined on oath as a witness ceases. The accused referred to in section 342 of the Code of Criminal Procedure means the accused who is under trial and under examination by the Court in the concerned case and does not include a person who might have been originally a co-accused, but the case against whom has been separated subsequently and he is only an accused in a different case. Such a person is also entitled to the benefits of section 132 of the Evidence Act.

Section 342-A of the Code of Criminal Procedure introduced by the recent amendment seems to contemplate a very special procedure to enable an accused to figure as a witness for himself and for any other accused who may be charged with him at the same time, subject of course to the conditions laid down in that section.

Quaere:—How far can such a witness claim the benefit under section 132 of the Evidence Act ?

V. L. Ethiraj, M. Narayanamurthi and *S. Pichai,* for Accused.

The Public Prosecutor (*P. S. Kailasam*) for the State.

R.M.

Ramaswami, J.
5th February, 1957.

Krishnaswami Iyengar *v.* Veeranna Chetty.
Crl. Rev. C. No. 849 of 1956.
(Crl. Rev. Pet. No. 788 of 1956).

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *sections* 22 *and* 87 *and rule* 4 (2)—*Disqualification of being appointed a trustee and effect—Scope—Validity of orders under section* 87—*When affected—Pendency of Civil suit—If a bar.*

Rule 4 (2) of the Rules framed by the Government under section 100 (*g*) of the Madras Hindu Religious and Charitable Endowments Act, 1951, relating to the age limits of officers and servants of the department cannot apply to the age limits of trustees which is governed by section 22 of the Act.

It is true that a person past 70 years cannot be appointed or hold office as a trustee of a religious institution. But the fact that a trustee validly appointed has attained the age limit and becomes disqualified to hold the office does not affect the validity of proceedings under section 87 of the Act. If a trustee is validly appointed on the date of appointment, it is sufficient for purposes of section 87. The mere pendency of a civil suit regarding the rights under dispute does not in any way affect the jurisdiction of a Magistrate to enquire into the matter of putting the trustee in possession of the properties of a religious institution in pursuance of a certificate under section 87. Only persons other than a trustee or servants who are claiming in good faith to be in possession of the property are exempt.

D. R. Krishna Rao, for Petitioner.

R. Sundaralingam, for Respondent.

V. V. Radhakrishnan for The Public Prosecutor (*P. S. Kailasam*) for State.

R.M. —— *Petition dismissed.*

Rajamannar, C.J. and Patel Electric Company, Ltd. *v.*
Panchapakesa Ayyar, J. Gani and Sons.
8th February, 1957. W.A. No. 44 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 13—*Power of Government under—Scope and extent of—When subject to judicial review.*

While it is true that an action of the Government granting exemption in individual cases under section 13 of the Madras Act XXV of 1949, is subject to judicial review, the Court cannot examine the correctness of the order as a Court of appeal. While the Court is entitled to examine the reasons given by the Government to find out whether they are relevant and material from the point of view of the object and policy of the Act, the Court will not interfere merely because in the circumstances stated and on the facts the Court will take a different decision.

The power of exemption cannot however be invoked to nullify the orders of the regular Tribunals under the Act merely because the Government feels that the orders were wrong. In such cases the statutory remedies of appeal and revision should be presumed. But if the Government is convinced that though under the Act the party aggrieved has no remedy but there are other circumstances which will entitle the party to have redress in equity, they could justifiably interfere and grant exemption in particular cases under the powers vested in them by section 13 of the Act.

M. S. Venkatarama Ayyar and *S. Viswanathan* for Appellant.

The Special Government Pleader (*V. V. Raghavan*), *M. A. Ghatala* and *B. R. Dolia* for Respondents.

R.M. —— *Appeal dismissed.*

Rajagopala Ayyangar, J. Arunachalam Pillai *v.* Chairman,
20th February, 1957. Central Government Industrial
Tribunal, Madras.
W.P. No. 940 of 1956.

Industrial Disputes Act (XIV of 1947), *section 18 (c)—Successors or assigns of an industry bound by the adjudication in an industrial dispute prior to the assignment—Scope of rule.*

A purchaser of an asset belonging to an employer cannot be deemed to be a successor to the business of the employer. Hence where pending an industrial dispute between the workers and management of a motor service organisation, merely because some of the buses belonging to the service are purchased by third parties and the route permit is transferred to the purchaser by the transport authority, the purchasers are not successors or assigns of the motor service within the meaning of section 18 (*c*) of the Industrial Disputes Act.

K. Thirumalai and *V. R. Naganathan* for Petitioner.

K. Narayanaswami Mudaliar and *S. Swamikannu* for Respondent.

R.M. —— *Rule absolute.*

Ramaswami Gounder, J. Manickam Chettiar *v.* Venkatachala Gounder.
12th February, 1957. S.A. No. 523 of 1954.

Partnership—Dissolution of—Suit for—Court fixing a date earlier to the suit as the date from which the partnership is deemed to stand dissolved—Legality.

In a suit for dissolution of partnership ordinarily the dissolution takes effect from the date of the judgment directing dissolution. But the Court may fix the date of dissolution from an earlier date, namely either the date of plaint or the issue of the writ of summons. In no event can a Court dissolve a partnership with effect from a date earlier to the suit. Mere suspension of business from any particular date cannot by itself have the effect of dissolving the partnership from the date.

T. Krishna Rao and *M. G. Kamath* for Appellant.

N. S. Raghavan for Respondent.

R.M. *Decree modified.*

Rajamannar, C.J. Great Eastern Shipping Co. *v.*
15th February, 1957. Govindaswami Chettiar.
C.R.P. Nos. 274 and 275 of 1955.

Madras Port Trust Act (II *of* 1905), *section* 39 (1)—*Liability of Port Trust for short delivery to the consignee.*

Where goods are shipped to a destination the master of the ship lands the goods at the port of destination and leaves them in charge of the Port Trust. It is only subsequently that the Port Trust authorities deliver the goods to the consignee. When the master of the ship, representing the carrier, lands the goods and leaves them in charge of the Port Trust, he is deemed to have delivered the goods to the consignee for whom the Port Trust is the agent. If the goods were actually landed and taken charge of by the Port Trust, the Port Trust will be liable to the consignee for non-delivery or short delivery and it cannot be said that there is no privity of contract between the consignee and the Port Trust.

Section 39 of the Port Trust Act does not absolve the Port Trust from their liability.

Messrs. King and Partridge, for Petitioner.

V. V. Raghavan, J. Nagarajan, N. R. Sesha Ayyar and *Ramanatha Davay,* for Respondent.

R.M. *Petition allowed.*

Ramaswami, J. Kannayya *v.* Haji Abdul Rahiman Sahib.
1st March, 1957. C.M.P. No. 560 of 1957 and
C.M.P. No. 5024 of 1956 in
C.R.P. No. 753 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (*a*) (*i*)—*Wilful default in payment of rent due—What amounts to.*

Rent is 'lawfully due' as soon as the proper date for payment has arrived. In the absence of estoppel or a variation in the terms of the tenancy, rent will be due on the specified dates even though the landlord has accepted unpunctual payment for a long period without protest and has not given the tenant any warning that punctual payment should be made in future. The fact that the landlord has in the past allowed the tenant to pay the rents after the due dates does not amount to a waiver of his right to future payments on the due dates.

B. Pocker, Md. Sayeed and *S. Mohamad Yahiya,* for Petitioner in C.M.P. No. 560 of 1957 and for Respondent in C.M.P. No. 5024 of 1956.

T. Aravamudha Ayyangar for Respondent in C.M.P. No. 560 of 1957 and for Petitioner in C.M.P. No. 5024 of 1956.

R.M. *Petition dismissed.*

Panchapakesa Ayyar, J. Nataraja Achari *v.* Balasubramanian.
5th March, 1957. C.R.P. No. 430 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (*c*)—*Landlord requiring additional accommodation for Business—Scope and extent of.*

A chief tenant, who has sub-let a portion, is a landlord within the meaning of the Rent Control Act and it is open to him to apply for eviction of his sub-tenant in case he requires the premises for his own use. A landlord can seek eviction of his tenant from a business place if he requires the place for carrying on his own business, even though that business may be different from the business he is already carrying on in another premises. Carrying on business need not necessarily mean that there is an active and vigorous trade. It is enough if all the preparations have been made. It is not open to the tenant to contend that the landlord can carry on both the businesses in the same place. Nor can he contend that he cannot get a similar place for the same low rent which he has been paying.

T. R. Srinivasa Ayyar, for Petitioner.

Messrs. Subramanyam and *Rajagopal*, for Respondent.

R.M. — *Petition dismissed.*

Somasundaram, J. Aravamutha Iyengar *v.* Rajarama Reddiar.
15th March, 1957. Crl. Rev. Case No. 866 of 1956.
Crl. Rev. Petn. No. 804 of 1956

Penal Code (*XLV of* 1860), *section* 500—*Defamation—Complaint as regards—Form of—Place of posting of a letter alleged to be defamatory—If sufficient to confer jurisdiction.*

The gist of the offence of defamation being the publication of the defamatory matter, the mere posting of a letter alleged to contain the defamatory matter at any particular place does not by itself confer jurisdiction on the Courts in the place of posting. There must be proof of publication as there is the possibility that letters posted at any place might not actually reach the destination, when alone publication will be complete. The Courts in the place where the publication takes place will alone have jurisdiction to try the offence.

44 M.L.J. 648; A.I.R. 1924 Mad. 340, referred.
(1952) 2 M.L.J. 751, explained.

C. K. Venkatanarasimhan, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) for the State.

V. S. Rangaswami Ayyangar, for the Complainant.

R.M. — *Orders accordingly.*

Ramaswami, J. Shanmugham, *In re.*
22nd March, 1957. Crl. Rev. Case No. 1079 of 1956.

Motor Vehicles Act (*IV of* 1939), *section* 31 (1)—*Transfer of ownership of motor vehicle—Duty to intimate.*

Section 31 (1) of the Motor Vehicles Act enjoins an obligation only on the transferee of a motor vehicle to report the transfer to the registering authority and forward the certificate of registration within 30 days of the transfer. The law casts no duty on the transferor and failure on the part of the transferor to intimate the transfer does not amount to an offence under the Act.

The Public Prosecutor (*P. S. Kailasam*) for Petitioner.

Ganapathi Subramania Iyer, *S. Eswara Ayyar* and *N. Kanakadas*, for the Accused.

R.M. — *Reference accepted.*

Somasundaram, J. Krishnaswami & Co. *v.* Coimbatore Municipality.
28th March, 1957. Crl. Rev. Case No. 1084 of 1956.
(Crl. Rev. P. No. 1045 of 1956.)

Madras District Municipalities Act (*V of* 1920), *sections* 250 (1) (*b*) *and* 338—*Chemists and druggists shop having a Frigidaire run by* 1/8 *H.P. electric motor—If requires license from the Municipality.*

Section 250 (1) (*b*) of the Madras District Municipalities Act is intended to apply only to installations in a premises of any electrical appliances for industrial purposes. As the scheme of the whole chapter in the Act in which this section appears relates only to 'Industries and Factories' the licence required by section 250 (1) (*b*) cannot apply to installation of a frigidaire in a chemists and druggists shop for the purposes of storing certain medicines.

(1949) 2 M.L.J. 263, followed.

K. S. Ramamurthi for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) for Respondent.

R.M. — *Conviction set aside.*

[SUPREME COURT.]

N. H. Bhagwati, B. Jagannadhadas,
S. J. Imam, P. Govinda Menon and
J. L. Kapur, JJ.
2nd *April,* 1957.

A. V. Fernandez *v.*
State of Kerala.
C.A. No. 232 of 1955.

Travancore-Cochin General Sales-Tax Act—Mode of computation of the net turnover.

"The amount for which the oil is sold in inter-State trade or commerce could not be lawfully included in the turnover of the dealer and if the amount for which the oil is sold cannot thus be included in his turnover, no occasion would arise for the deduction of the value of the cocoanut or copra or groundnut or kernal purchased and converted by the dealer into such oil and cake".

T. M. Subramanya Ayyar, Senior Advocate, with *R. Ganapaty Iyar* for Appellant.

K. S. Krishnaswami Iyengar, Senior Advocate, with *Sardar Bahadur*, Advocate for Respondent.

G.R. — *Appeal dismissed.*

[SUPREME COURT.]

N. H. Bhagwati and J. L. Kapur, JJ.
2nd *April,* 1957.

Bhagawandas *v.*
State of Rajasthan.
Cr. Appeal No. 50 of 1957.

Criminal Trial—No sufficient evidence of guilt—High Court cannot interfere with acquittal order.

The evidence upon which the High Court had relied was not of a quality from which "a legitimate inference of the guilt of the accused could properly be drawn." The judgment of the High Court did not disclose any compelling reasons justifying its interference with the order of acquittal of the trial Court, and therefore it must be set aside.

M. B. Lall, for Appellants.

Kan Singh with *T. M. Sen*, for the State.

G.R. — *Appeal allowed.*

[SUPREME COURT]

S. R. Das, C.J., S. J. Imam, S. K. Das,
P. Govinda Menon and A. K. Sarkar, JJ.
5th *April,* 1957.

Ramji Lal Modi *v.*
State of Uttar Pradesh.
Petition No. 252 of 1956.

Penal Code (XLV of 1860), *section* 295-*A—Scope and constitutional validity—Article* 19 *of the Constitution of India.*

The Language employed in section 295-A of Penal Code is not wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental rights guaranteed by Article 19 (1) of the Constitution and consequently section 295-A of the Penal Code is valid.

Veda Vyasa, Senior Advocate and *S. K. Kapur* and *Ganpat Rai*, Advocates with him, for Petitioner.

G. C. Mathur and *C. P. Lal*, Advocates for the State.

G.R. — *Petition dismissed.*

[SUPREME COURT.]

S. R. Das, C.J., S. J. Imam, S. K. Das.
P. Govinda Menon and A. K. Sarkar, JJ.
5th April, 1957.

State of Madhya Bharat *v.*
Veereshwar Rao Agnihotri.
Cr. Appeals Nos. 130 and 131 of 1954.

Criminal Procedure Code (V of 1898), *section* 403—*Investigation under Prevention of Corruption Act—Not a bar to conviction for offence under section* 407 *of the Penal Code (XLV of* 1860).

The principle of "*autrefois acquit*", *i.e.*, a person cannot be convicted on the same facts if once he has been acquitted on those facts applied only in the case of a second trial on the same facts. The principle did not apply as in the present case, where the accused was charged with two alternative offences in one trial. Consequently the judgment of the High Court was set aside and the High Court was directed to hear the appeal on its merits.

Shiv Dayal and *R. H. Dhebar*, Advocates for Appellant.

B. C. Misra, Advocate for Respondent.

G.R. ——— *Appeal remanded.*

[SUPREME COURT]

S. R. Das, C.J., T. L. Venkatarama
Ayyar, B. P. Sinha, S. K. Das
and Gajendragadkar, JJ.
9th April, 1957.

State of Bombay *v.*
R.M.D.C., etc.
C.A. Nos. 134 to 136 and 187 of 1956.

Bombay Lotteries and Prize Competitions Control and Tax Act (LIV of 1948)—*Constitutional validity—Constitution of India, Articles* 19, 301 *to* 304.

The Bombay Prize Competition Act primarily aims at the regulation and control of gambling competitions. The Constitution enables a State Legislature to tax and frame laws in respect of gambling and hence this legislation was valid. Since the competitions organized under the name of R.M.D.C. Cross words were in the nature of gambling, the Act and its taxing provisions were applicable to them.

H. M. Seervai, Counsel for Appellant.

M. C. Setalvad, Attorney-General of India, for Respondents.

G.R. ——— *Appeals allowed.*

[SUPREME COURT.]

S. R. Das, C.J., T. L. Venkatarama
Ayyar, B. P. Sinha, S. K. Das
and Gajendragadkar, JJ.
9th April, 1957.

R.M.D.C., etc. *v.*
Union of India.
Petitions Nos. 78 to 80, 90 and 152 of 1956.

Prize Competition Act, (XLII of 1955)—*Constitutional validity—Constitution of India, Articles* 19, 301 *to* 304.

Gambling as an activity could not be properly described as a trade or business which had been guaranteed freedom in the Constitution. The Prize Competitions Act applied only to competitions which fell in the gambling class and since these were outside the protection of Article 19 there could be no question of the violation of any fundamental right.

On a true construction, the Act covers only gambling competitions and it is a law with respect to betting and gambling under Entry 34.

The law as applicable to gambling was capable of severance in the Act, and consequently the Act could not be assailed on this ground.

Palkiwala, K. C. Jain and *Ganpat Rai*, Advocates for Petitioners.

H. M. Seervai, Advocate for Respondent.

G.R. ——— *Petitions dismissed.*

[Supreme Court.]

B. Jagannadhadas, B. P. Sinha
and Gajendragadkar, JJ.
10th April, 1957.

Sarwan Singh and Harbans Singh *v.*
State of Punjab.
Cr. Appeals Nos. 22 and 23 of 1957.

Criminal trial—Approver's evidence—Appreciation of—Tests.

The appreciation of the evidence of an approver has to satisfy two tests. His evidence must show that he is a reliable witness. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration.

The conviction in so far as they were based on the approver's evidence must be set aside.

In view of the involuntary nature of the confession in this case and the unreliability of the evidence of the approver, both the appellants were acquitted.

G. C. Mathur and *R. L. Kohli*, Advocate for Appellants.

Sardar Gopal Singh, Advocate for the State.

G.R. *Appeals allowed.*

[Supreme Court.]

S. R. Das, C.J., S. J. Imam, S. K. Das,
P. Govinda Menon and A. K. Sarkar, JJ.
11th May, 1957.

Collector of Malabar *v.*
Erimal Ibrahim Hajee.
Crl. Appeal No. 145-A of 1954.

Income Tax Act (IX of 1922), *section* 46 (2)—*Validity of Madras Revenue Recovery Act* (II of 1864), *sections* 5 *and* 48—*Constitution of India* (1950), *Articles* 14, 21 *and* 22.

The validity of section 46 (2) of the Income-tax Act had already been considered and upheld in *Pushottam Govindji* v. *B. M. Desai*, (1956) S.C.J. 75 : (1956) An.W.R. (S.C.) 51 : (1956) 1 M.L.J. (S.C.) 51 : (1955) II S.C.R. 887 and the view taken in that case is equally applicable to the present petition. There was nothing in section 48 of the Madras Act which required the Collector to give the defaulter an opportunity to be heard before arresting him. The only thing necessary was that the Collector must have some material upon which he based his belief and a Court could look into that material in appropriate cases in order to find out if the conditions laid down in the section had been fulfilled or not.

The right to personal liberty under Article 19 was subject to the provisions of Article 21 and consequently if a person was deprived of his liberty according to procedure established by law then he could not complain of the infraction of his fundamental right under Article 19. Consequently the question to consider was whether the detention in the present case was according to a valid law.

(1954) 2 M.L.J. 683, reversed.

Porus A. Mehta and *R. H. Dhebar*, Advocates, for Appellant.

Pokar and *B. K. Naidue*, Advocates, for Respondent.

G.R. *Appeal allowed.*

[Supreme Court.]

B. Jagannadhadas, B. P. Sinha
and Gajendragadkar, JJ.
12*th April*, 1957.

Vadivelu Thevar *v.*
State of Madras.
Cr. Appeals Nos. 24 and 25 of 1957.

Criminal Trial—Evidence—Offence of murder—Solitary eye-witness—Value of evidence.

As a general rule a Court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of an indifferent character.

Unless corroboration is insisted upon by statute, Courts should not insist on corroboration except in cases where the nature of the testimony of the single witness requires, as rule of prudence, that corroboration should be insisted upon.

Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

Evidence has to be weighed and not counted.

H. J. Umrigar and *S. Subhramanya*, Advocates for Appellants.

N. Kailasham with *T. M. Sen*, Advocates, for Respondent.

G.R. *Appeals dismissed.*

Rajagopala Ayyangar, J.
21st February, 1957.

Tanjore Palace Devasthanam *v.* Estates Abolition Tribunal, Madurai.
W.P. No. 125 of 1956.

Madras Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Minor inam—When could be taken over under the Act.

Section 1 (4) of the Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948, sets out the kinds of estates which could be taken over by the Government under that Act. They comprise zamindari, under-tenure or Inam estates. These are defined in the several sub-clauses of section 2 of the Act. The net result of these definitions is that minor inams created by a landholder subsequent to the original grant will be within the Act as they were comprised in and were part of what was originally an ' estate '. If however the grant was not by the landholder, be he an inamdar or holder of other types of estates, but the existence of those minor inams were recognised by the British Government without detracting from the original grant being an estate within the meaning of the Estates Land Act, such minor inams do not by themselves satisfy the definition of an estate and are outside the provisions of the Estates Abolition Act.

(1953) 2 M.L.J. 748, followed.

If portions of land in a village are granted in inam the lands so granted are not ' estates '. The subsequent grant of the other areas of the whole village, though in itself may constitute an estate, cannot have the effect of converting the anterior grant of lands, which never formed part of an estate, into an estate.

G. R. Jagadisan for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *S. Ramachandra Ayyar* for Respondents.

R.M. *Rule absolute.*

Rajagopala Ayyangar, J.
21st February, 1957.

Joseph Sam *v.* Caltex India, Ltd., Madras.
W.P. No. 524 of 1956.

Madras Shops and Establishments Act (XXXVI of 1947), *sections* 4 (1) (*a*), 41 *and* 51—*Jurisdiction of Additional Commissioner to decide incidental questions—If bound to refer to Commissioner under section* 51.

The wording of section 51 of the Madras Shops and Establishments Act, 1947, is no doubt very wide if considered independently. But the Statute deals with a variety of situations in which the employer and workmen might seek the assistance of the authorities under the Act. An appellate authority acting under section 41 of the Act has jurisdiction to determine all relevant matters in issue before it while hearing an appeal under section 41 (2) of the Act. Section 41 of the Act is not made subject to the provisions of section 51 of the Act and the appellate authority is not bound to refer to the Commissioner under section 51 of the Act any question which is incidental to the determination of matters within its jurisdiction.

Where the question arises in an appeal by an employee under section 41 (2) of the Act whether the employee is 'a person employed in a position of management' within the meaning of section 4 (1) (*a*), thus taking him out of the purview of the Act, the appellate authority has jurisdiction to decide the question and is not under a duty to refer the question to the Commissioner of Labour under section 51 of the Act.

M. K. Nambiyar and *K. Venugopal*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for *Messrs. King and Partridge*, for 1st Respondent.

The Special Government Pleader (*V. V. Raghavan*), for 2nd Respondent.

R.M. *Rule discharged.*

Somasundaram and Basheer Ahmed Sayeed, JJ. In *re* Murugian.
12th March, 1957. Crl. Appeal No. 528 of 1956.

Penal Code (XLV of 1860), *section* 300—*Exception* (1)—*Grave and sudden provocation—What constitutes—Wife leading an immoral life refusing to return to path of virtue and abusing husband for remonstrating against her conduct—Husband inflicting injuries causing death of his wife under such circumstances—Grave and sudden provocation—If could be presumed.*

In a society like ours where adultery is made punishable, where a lawfully wedded wife of an accused not only resorts to illicit intimacy with another but also swears openly in the face of her husband that she would persist in such conduct and abuses her husband for remonstrating against her conduct, and the husband is provoked and inflicts injuries on his wife which causes her death, it is reasonable to presume that the husband lost his self-control as a result of grave and sudden provocation. Standards applicable to societies in western countries where such lapses are looked upon with greater latitude and are deemed to be redressible by award of damage, are not applicable to this country. The gravity of the provocation is a psychological problem and each case has to be considered in the circumstances that prevail at the given situation.

Where premeditation or pre-planning is ruled out, the commission of an offence by an accused in the vicinity of a police station and in the very presence of the police officers is not usual and unless something unusual and extraordinary has happened on the spot and at that moment it is reasonable to presume that the offence would not have been committed, especially where it is established by evidence that it could have been committed more easily in a different place much earlier.

(1942) A.C. 1 : (1946) All E.R. 124, explained.

P. R. Gokulakrishnan, for Appellant.

The Public Prosecutor (*P. S. Kailasam*), for the State.

R.M. *Sentence reduced.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
21st February, 1957.

Vijayaraghavan *v.* State of Madras.
W.A. No. 128 of 1956.

Cinematograph Act (II of 1918), *section* 8 (1)—*Scope and nature of powers under—License under the Act—When can be revoked.*

Section 8 (1) of the Cinematograph Act provides two modes by which a licensee under the Act can be penalised for contravention of the Act or Rules. One is punishment, presumably to be imposed by a Court when the offender is prosecuted. The second is revocation of the licence granted by the authority. In any particular case it is open to the authorities to resort to any one of the methods of punishment or both. A prosecution and conviction by a Criminal Court is not a condition precedent to the exercise of the power of cancelling the licence by the authorities.

A licence granted under the Act can be revoked by the authority granting it for contravention of any of the provisions of the Act or rules made thereunder or for contravention of any of the specific conditions contained in the licence itself. Section 8 of the Act provides for several contingencies and the power of revoking a license under that section can be invoked for contravention of any of the provisions of the Act or the rules or the conditions of the licence.

K. S. Champakesa Ayyangar and *K. C. Srinivasan*, for Appellant.

The Special Government Pleader (*V. V. Raghavan*), for Respondent.

R.M. *Appeal dismissed.*

Rajagopala Ayyangar, J.
6th March, 1957.

Alangavara Chetty *v.* Municipal Council, Pollachi.
W.P. No. 877 of 1955.

Madras District Municipalities Act (V of 1920), *sections* 244, 249 *and Schedule V—Licensing of tea stalls on railway premises—Jurisdiction of Municipality—Scope of exemption from licensing provisions.*

The exemption granted by section 244 of the District Municipalities Act from its licensing provisions in section 249, is only in favour of the activities of the Government and of the statutory bodies named in that section. Running a tea stall even though on a railway platform under license from the railway authorities, requires a licence from the Municipality under the District Municipalities Act. Though the railway premises may be the property of the Union Government still so long as it is in the territorial limits of a municipality, the Municipality has jurisdiction to regulate and license the trade carried thereon.

Even though the language of section 244 of the Madras District Municipalities Act is different from the language of the analogous sections of the City Municipal Act and Madras District Boards Act, still having regard to the legislative history of the licensing regulations and having regard to the need to avoid an interpretation which might lead to patent absurdity, the exemption granted under section 244 of the Act can only apply to activities carried on by Government or the enumerated statutory bodies and not to private individuals carrying on a trade requiring a licence, even though such trade might be carried on on the premises or land owned by Government. It is the activity that is carried on that attracts the licensing provisions and regulation under section 249.

(1955) 2 M.L.J. 555, followed.

(1951) 2 M.L.J. 657, distinguished.

(1951) 2 M.L.J. 345, explained.

N. Panchapakesa Ayyar, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*), *V. Srinivasan*, The Special Government Pleader (*V. V. Raghavan*) and *T. Ramakrishna* for *C. A. Vaidialingam*, for Respondent.

R.M. — *Petition dismissed.*

Somasundaram, J. Public Prosecutor *v.* Karuppiah Pllai.
25th March, 1957. Cr. Appeal No. 301 of 1956.

Madras Village Panchayats Act (X of 1950), *section* 96 (3)—*Orders on an application for licence—Nature of.*

An application for the issue of a licence under the Madras Village Panchayats Act has to be disposed of within the time specified under section 96 (3) or such other time as may be specified by notification. If no orders are passed by the Panchayat within the specified time it is presumed that the application for the issue of license is granted.

But an order passed under section 96 (3) of the Act need not always be a final order either granting or refusing the licence applied for. They may be in the nature of interim orders refusing to grant the license pending further enquiry or receipt of the report called for on the application for license. Such an order will still be one under section 96 (3) and an applicant cannot proceed with the work till it is finally decided by the Panchayat whether to grant the license or not.

The Public Prosecutor (*P. S. Kailasam*), for Appellant.

C. K. Venkatanarasimhan, for the Accused.

R.M. — *Acquittal held not proper.*

Rajagopalan, J. Krishna Reddiar *v.* Venkatakrishna Reddiar.
26th March, 1957. W.P. No. 977 of 1956.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 12 (2) —*Public Charitable trust becoming a 'specific endowment' by notification under the Act—Jurisdiction of Area Committee to appoint trustees—Provisions of earlier scheme decree—If binding on the Area Committee.*

An Area Committee has jurisdiction over all the temples and 'specific endowments' attached to those temples within the territorial limits over which its jurisdiction could be exercised. It has no jurisdiction over any other endowment.

It may be that a public charitable endowment is to be deemed to be a 'specific endowment' within the meaning of section 2 (16) of the Madras Hindu Religious and Charitable Endowments Act when once a notification is issued under section 3 of the Act. But this is only a fiction. Section 12 (2) of the Act confers jurisdiction over Area Committees only in respect of specific endowments attached to temples and not in cases of other endowments that might be deemed to be specific endowments by virtue of a notification under section 3 of the Act.

Where a scheme decree framed in respect of a trust provides specifically a method of appointing the trustees, the Area Committee is bound by the terms of the scheme decree.

A. Srirangachari, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *Munuswamy Reddy*, for Respondents.

R.M. ——— *Rule absolute.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
26th March, 1957.

Commissioner of Hindu Religious and Charitable Endowment Board, Madras *v.* Mounna Matta Kattalai, etc.
C.R.P. Nos. 438 and 1678 of 1953.

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 103 (*e*) (ii)—*Applicability.*

The effect of section 103 (*e*) (ii) of the Madras Hindu Religious and Charitable Endowments Act is to substitute the Commissioner under the Act for the Court in respect of scheme decrees framed by a Court before the Act. The scheme framed by the Court is deemed automatically to be a scheme framed under the Act. All the powers and duties of the Court under the scheme decree will be deemed to have been conferred or imposed in the Area Committees or the Commissioner under the Act. The Commissioner's power of appointment of trustees or managers or supervision over them will have to depend on the clauses of the scheme decree and not on the provisions of the Act and any such appointment made will be in law an appointment made under the scheme and not under any of the provisions of the Act.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Government Pleader (*C. A. Vaidialingam*), for Petitioner.

K. V. Venkatasubramania Ayyar, M. S. Venkatarama Ayyar, S. Nagaraja Ayyar and *P. Ramanatha Mudaliar*, for Respondents.

R.M. ——— *Orders accordingly.*

Somasundaram, J.
3rd April, 1957.

Balagurunatha Chettiar, *In re.*
Cr. Rev. C. No. 1099 of 1956.
(Cr. Rev. P. No. 1029 of 1956.)

Madras District Municipalities Act (*V of* 1920), *section* 250 (2)—*Licence under—Conditions—Period of Licence—If could be restricted for a definite period.*

In cases of licences falling under section 250 of the Madras District Municipalities Act, the Municipality shall grant the license under section 250 (3) of the Act either absolutely or subject to certain conditions as it thinks fit to impose. The conditions referred to are the general conditions as to health, sanitation, nuisance to neighbours, etc. The Municipality cannot impose a condition restricting the period of licence for one year only. A licence once granted under section 250 (3) of the Act does not require to be renewed and the restriction on the period of the licence is not binding on the applicant.

T. R. Ramachandran, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the Respondent.

R.M. ——— *Conviction set aside.*

Ramaswami Gounder, J.
6th February, 1957.

Subbu Chetty *v.* Muniswami Chetty.
C.R.P. No. 896 of 1956.

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 87—*No evidence as to whether person in possession (claiming title in his own right) was an ex-trustee—Summary order under section* 87 *for delivery of property—If can be passed.*

Where the person in possession of the property claimed title in his own right and in the absence of any evidence and finding that he was an ex-trustee and in that capacity continued in possession, he could not be ousted by a summary order under section 87 of the Madras Hindu Religious and Charitable Endowments Act.

N. Arunachalam, for Petitioner.

R. Sundaralingam, for Respondent.

V.S. —————— *Petition allowed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
1st March, 1957.

Srinivasa Sastri *v.* Jagadguru Sri Sankaracharya Swamigal.
L.P.A. No 30 of 1953.

Code of Civil Procedure (*V of* 1908), *section* 48—*Decrees—Executability—Twelve years' period of limitation—Applicability—Transfer of decree for execution—Execution application before receipt of transferred decree by the executing Court—If would save limitation.*

It is true that when a decree is transferred to another Court for execution and if the order of transfer is within the twelve years' rule an execution petition, though filed before the actual transmission of the decree in the transferee Court, will be in time. But where an execution petition is filed within twelve years in the transferee Court but the order of transmission is passed after the expiry of twelve years, the decree will not be saved under section 48 of the Code of Civil Procedure.

B. V. Ramanarasu and *K. Raman*, for Appellant.

P. C. Parthasarathy Ayyangar, for Respondent.

R.M. —————— *Appeal dismissed.*

Basheer Ahmed Sayeed, J.
15th March, 1957.

Meenakshi *v.* Hari Narayanachar.
C.R.P. No. 118 of 1957.

Madras Buildings (Lease and Rent Control) Act (*XXV of* 1949), *section* 7 (2) (ii) (b) —*Using a building for a purpose other than that for which it was leased—Selling* iddilies *and* vadais *in Tea Stall—If constitutes different user.*

Unless a premises let for running a Tea Stall is converted into a different shop by the substitution of another business, mere selling of *iddilies* and *vadais*, procured from outside and not prepared on the premises, along with tea will not amount to carrying on different business.

(1949) 2 M.L.J. 11 (N.R.C.), followed; (1955). 1 M.L.J. 2 (N.R.C.); (1955) 2 M.L.J. 51, referred.

G. K. Raman, for Petitioner.

T. V. Balakrishnan, *N. Vanchinathan*, and *K. R. Natarajan* for Respondent.

R.M. —————— *Petition allowed.*

Somasundaram, J.
20th March, 1957.

Marudayya, *In re.*
Crl.R.C. No. 397 of 1956.
(Crl.R.P. No. 358 of 1956).

Penal Code (*XLV of* 1860), *section* 408—*Criminal breach of trust—Money obtained by deceipt if could be subject to breach of trust.*

Where money is obtained by an accused by trickery the money so obtained by the person cannot be said to have been entrusted to that person by the person who parted with the money. Hence misappropriation of such money by an accused cannot amount to an offence of criminal breach of trust though in appropriate cases under such circumstances a conviction may be upheld for cheating or for the lesser offence of misappropriation under section 403, Indian Penal Code.

M—N R C

V. L. Ethiraj, S. Mohankumaramangalam, K. V. Sankaran and *M. Narayanamurthy*, for Petitioners.

The Public Prosecutor (*P. S. Kailasam*), for the State.

T. Venkatadri and *G. K. Raman*, for P.Ws. 1 and 8.

R.M. ——— *Orders accordingly.*

Rajamannar, C.J. Hazarimull & Co. *v.* Estate of P.C. Balu Doss.
22nd March, 1957. C.R.P. No. 324 of 1956.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (a) *and Proviso—Wilful default—What amounts to.*

There is a clear difference in law between default and wilful default. While non-payment of rent within the time specified by the Act will certainly tantamount to a default, obviously any default cannot be treated in law as wilful default. Where the rent due has been sent on or about the date on which proceedings were taken for eviction against a defaulting tenant by the landlord, by the mere fact that there was default by the end of a particular month and it was paid only after a few days of the following month the default cannot be said to be wilful to entail the punishment of eviction.

K. Krishnaswami Ayyangar and *P. Venkatachari*, for Petitioner.

P. B. Ananthachri and *P. B. Sundararajan*, for Respondent.

R.M. ——— *Petition allowed.*

Somasundaram, J. Retta Koravan, *In re.*
25*th March,* 1957. Crl.R.C. No. 1045 of 1956.
(Crl.R.P. No. 979 of 1956).

Penal Code (XLV of 1860), *section* 224*—Escape from lawful custody—What amounts to.*

Where a person is forcibly snatched away from the custody of the police by some one else it cannot be said that the person has intentionally escaped from lawful custody so as to make him liable for punishment under section 224 of the Indian Penal Code.

A.I.R. 1950 Orissa 62, followed.

R. Santhanam and *T. S. Arunachalam*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the State.

R.M. ——— *Conviction of the particular accused set aside.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. State of Madras, *Appellant.*
3*rd April,* 1957. W.A. No. 59 of 1957.

Arms Act (XI of 1878)*—Cancellation of license issued under Procedure.*

It is incumbent on the officer purporting to cancel a gun license to first inform the licensee the grounds on which the cancellation is proposed to be made and also to record in writing the grounds on which the cancellation is eventually made. This order must be communicated to the licensee as he has a right of appeal against any order of cancellation.

Where an administrative order interferes with the fundamental right of a citizen to hold property the Court has jurisdiction under Article 226 of the Constitution to investigate the validity of the order.

The Special Government Pleader (*V. V. Raghavan*), for Appellant.

R.M. ——— *Appeal dismissed.*

Rajagopalan, J. Ganapathi Mutiriyar *v.*
3*rd April,* 1957. Narayanaswami Vaithyar.
Crl. R.C. No. 169 of 1957.
(Crl.R.P. No. 166 of 1957).

Code of Criminal Procedure (V of 1898), *sections* 146 (1) *and* 435*—Jurisdiction of High Court to interfere in revision against administrative orders of a Magistrate.*

The High Court has power to interfere in revision under section 435 of the Code of Civil Procedure even in regard to orders passed by a Magistrate in the course of administration of the properties attached under section 146 (1) of the Code, though the High Court will be extremely reluctant to exercise its revisional power in the absence of compelling reasons. Where the property is in *custodia legis* and orders are passed in respect of the administration of the property the orders passed are orders of Court and the proceedings are within the scope of section 435 of the Code. The question of interference by the High Court in such cases is one of discretion and not of jurisdiction.

I.L.R. 7 Pat. 1, followed.

(1947) 2 M.L.J. 459 ; (1912) 14 I.C. 759, distinguished.

T. M. Chinnaiya Pillai, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for the State.

A. V. Narayanaswami, for Respondent.

R.M. *Orders accordingly.*

Somasundaram, J. Arunachalam Chettiar, *In re*.
5th April, 1957. Crl.A. No. 302 of 1956.

Madras Public Health Act (III of 1939), *section* 3 (10) *"Factory" and Madras District Municipalities Act (V of* 1920), *sections* 249 *and* 250—*Combined effect on licensing provisions for running a factory in residential areas.*

The definition of 'factory' in section 3 (10) of the Madras Public Health Act, 1939, has to be taken for the purpose of sections 249 and 250 of the Madras District Municipalities Act which does not contain any definition of a factory. If so taken, in a residential area which has been notified under section 89 (1) of the Public Health Act and in which the establishment of a factory is prohibited under section 92 (*a*) of the Act, section 250 of the District Municipalities Act cannot be invoked for the purpose of establishing a factory in that area. Section 250 of the District Muncipalities Act will apply only to areas which are not notified as residential areas under the Public Health Act. There may be areas which are residential. But if they are not notified under section 89 (1) of the Public Health Act, section 250 of the District Municipalities Act may still be invoked. There is therefore no inconsistency between section 250 of the District Municipalities Act and sections 89 and 92 of the Public Health Act.

The Public Prosecutor (*P. S. Kailasam*), for Appellant.

M. Srinivasagopalan, for Accused.

R.M. *Appeal allowed.*

Rajagopalan, J. Muthukumaran *v.* Dt. Collector, Tiruchi.
9th April, 1957. W.P. Nos. 118 & 281 of 1957.

Madras Cinemas (Regulation) Act (IX of 1955), *section* 5—*Grant or refusal of licence for running a cinema—Order of refusal based on irrelevant considerations—Validity.*

In the absence of any specific statutory provisions or any directions issued by the competent authority under section 5 (4) of the Madras Cinemas (Regulation) Act, 1955, the factors that should govern the decision of the licensing authority are those set out in section 5 (1) of the Act. It may be that the factors enumerated in section 5 of the Act are not exhaustive and the Licensing Authority may take into consideration other relevant factors also. In cases where there are more than one applicant for licence and the license could be issued to only one, sub-clauses (*b*), (*c*) and (*f*) of section 5 and the representations, if any, referred to in the section would furnish a basis for selection.

An order refusing to grant a license to an applicant and granting it to another applicant solely on the ground that the other had obtained the license under the Places of Public Resort Act earlier is vitiated by an error as it has taken into consideration a wholly irrelvant factor, *viz.*, the priority of application under different Act, into consideration.

Quaere : Can the priority of the date of application for license be a relevant factor under section 5 of the Madras Act (IX of 1955) to choose between rival applicants ? Should the other relevant factors to be considered by the licensing authority be restricted to only those that are relevant within the scheme of the Madras Act (IX of 1955) ?

S. Mohankumaramanglam and *K. Parasaran,* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*), *E. R. Krishnan* and *V. Nagarajan,* for Respondent.

R.M. —— *Rule absolute.*

Rajagopala Ayyangar, J. Pichai Ammal *v.* Revenue Court, Tiruchi.
10th April, 1957. W.P. Nos. 722 to 725, *etc.* of 1956.

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 2 (a)—*Cultivating tenant*—Mattuvaramdar *and* Kaiaeruvaramdar *in Tiruchi District—If cultivating tenants.*

Mattuvaramdars and *Kaiaeruvaramdars* (are not cultivating tenants within the meaning of section 2 (*a*) of the Madras Act (XXV of 1955) and the Revenue Court has no jurisdiction to direct restoration to possession of such persons. The principal incident of *Mattuvaram,* from which the system takes its name, is that the cultivator uses his own bulls for ploughing the landowner's lands. In *Kaiaeruvaram* the cultivator uses the bull supplied by the landlord. The expression 'varam' in such terms signifies in the context the share which the cultivator gets for his services and this is in proportion to the out-turn. Though the operations carried on by the varamdars might come within the definition of 'cultivation' in section 2 (*b*) of the Act, such persons do not come within the definition of 'cultivating tenant' under section 2 (*a*) of the Act. In order to satisfy the definition under section 2 (*a*) the cultivation of land in the manner set out in the section should be under an agreement of tenancy, express or implied. A mere crop sharing by a cultivator would not by itself import tenancy, which implies a relationship with the landowner under which the cultivator is given exclusive possession of the land for a term. *Mattuvaramdars* and *Kaiaeruvaramdars* are merely pannaiyals remunerated by a share of the net out-turn. There is no tenancy agreement, express or implied with them and hence they are not within the definition of 'cultivating tenant'.

(Concept of 'tenancy' and 'possessory right' explained—Nature of the special kinds of services by cultivators in Tiruchi District explained).

K. V. Venkatasubramania Iyer, K. S. Desikan, K. Raman and *S. Annadurai,* for Petitioner in W.P. No. 722 of 1956 and in W.P. Nos. 723 to 725 of 1956.

S. Ramachandra Iyer and *P. S. Srisailam,* for Petitioner in W.P. Nos. 999 and 1129 of 1956.

A. V. Narayanaswami Ayyar and *R. Venkatachalam,* for Petitioner in W.P. No. 1095 of 1956.

M. K. Nambiar and *C. F. Louis,* for Petitioner in W.P. No. 1239 of 1956.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghvan*), on behalf of the State in all the Petitions.

T. Chengalvarayan, for 2nd Respondent in W.P. Nos. 722 to 725 of 1956.

V. S. Rangaswami Ayyangar, for Respondents 2 and 3 in W.P. Nos. 999 and 1129 of 1956.

S. Mohankumaramangalam and *K. V. Sankaran,* for 1st Respondent in W.P. No. 1095 of 1956.

K. Narayanaswami Mudaliar and *S. Swamikannu,* for 2nd Respondent in W.P. No. 1239 of 1956.

R.M. *Rule absolute.*

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JANUARY—JUNE, 1957.

Chief Justice.

The Hon'ble Mr. P. V. Rajamannar, B.A., B.L.

Puisne Judges.

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The

Madras Law Journal Reports.

1] JANUARY [1957

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The State of Madras through the Secretary, Revenue Department, Madras .. *Appellant**

v.

K.S. M.K. Kasi Mohamad .. *Respondent.*

Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—*Notification under—Power to issue under Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of* 1948)—*Finding of Appellate Tribunal that grant was not of entire inam village and therefore it was not an " estate "—Acquiescence in by Government—Government if can issue notifications under Rent Reduction Act in respect of such grants.*

It is doubtful if a notification by the Government under Madras Estates Land (Reduction of Rent) Act which is a unilateral act, can be held to be a suit or a proceeding in a civil Court to which section 64-A of the Estates Abolition Act in terms apply.

But it will be most anomalous that the State which has allowed the order of the Appellate Tribunal holding that the grant is not of the whole village, and, therefore, it would not be an estate, to become final, should be allowed to make a notification under the Rent Reduction Act on the footing that the grant is of a whole inam village. Having acquiesced in that decision under the Estates Abolition Act it is not open to the Government to sustain a notification under the Rent Reduction Act which is obviously wrong if the ground of the decision of the Tribunal is right.

Appeal under clause 15 of the Letters Patent, against the order of Subba Rao, J. dated 18th March, 1952 and made in C.M.P. No. 10040 of 1950, presented to the High Court for the issue of a writ of *certiorari* calling for the records, to annul and quash the proceedings taken by the respondent therein under the Madras Act XXX of 1947 with regard to the village of the petitioners therein, Vennathur in the Ramnad Taluk of the Ramnad district.

The Special Government Pleader (*V. V. Raghavan*) for Appellants in all the Appeals.

R. Kesava Ayyangar and *K. Parasaran* for Respondents in L.P.A. Nos. 230 and 276 of 1952 and for Respondents 1 and 2 in L.P.A. No. 305 of 1952.

The Judgment of the Court was delivered by

Rajamannar, C.J.—In these three appeals, in which the State of Madras is the appellant, a common question arises. Under the Madras Estates Land (Reduction of Rent) Act (Madras Act XXX of 1947) the State issued notifications in respect of three villages in Ramnad district. There were also notifications issued under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, in respect of these three villages. Under section 9 of the Madras Act XXVI of 1948 there was an enquiry regarding each of these three villages by the Assistant Settlement Officer. As regards the villages covered by L.P. Appeals Nos. 305 and 230 of 1952, the Settlement Officer held that the villages were inam estates within the meaning of Act XXVI of 1948, whereas as regards the village concerned in L.P. A. No. 276 of 1952 the Settlement Officer held it was not a inam estate. There were appeals to the Abolition Tribunal. The Tribunal held that none of the three concerned villages was an inam estate within the meaning of Madras Act XXVI of 1948 on the ground that the original grant was not of a whole village but was only of part of a village. The proprietors of the villages filed three applications before this Court C.M. Ps. Nos. 8308 of 1950, 10040 of 1950 and 11376 of 1950 for the issue of writs of *certiorari* to quash the notifications made by the Government under the Rent Reduction Act regarding the three villages respectively. These applications came on before Subba Rao, J., who first disposed of C.M. P. No. 8308 of 1950 and followed the decision therein in disposing of the remaining two applications. The learned Judge held that in view of the decision of the Tribunal, which had become final that the grant was not of a whole village, it was not open to the Government to sustain the notification under the Madras Estates Land (Reduction of Rent) Act. The learned Judge was evidently inclined to apply section 64-A of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, which declares that the decision of the Tribunal or Special Tribunal under the Act or of a Judge of the High Court hearing a case under section 51 (2) on any matter falling within its or his jurisdiction shall be binding on the parties thereto and persons claiming under them in any suit or proceeding in a Civil Court in so far as such matter is in issue between the parties or persons aforesaid in such suit or proceeding. The learned Judge held that the effect of this is to make the decision of the Settlement Officer or the Tribunal binding in any subsequent proceeding between the parties. In this view he allowed the three applications filed by the parties and quashed the notifications under the Rent Reduction Act. Hence these appeals by the Government.

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* L.P.A. Nos. 230, 276 and 305 of 1952. 2nd July, 1956.

We are not prepared to agree entirely with Subba Rao, J., in his construction of section 64-A of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. It is doubtful if a notification by the Government under the Rent Reduction Act, which is a unilateral act, can be held to be a suit or proceeding in a Civil Court. In our opinion section 64-A of the Abolition Act cannot in terms apply to the present case.

The learned Special Government Pleader referred us to the decision of a Bench of this Court in *Venkatanarasayya* v. *State of Madras*[1], which discussed the scope of section 9 of the Abolition Act. But this ruling has no direct bearing on the question except in so far as it makes it clear that it is not every decision of a Settlement Officer or the Tribunal that will fall within the scope of section 64-A of Madras Act XXVI of 1948. Nor is the other decision of the Full Bench in *Venkatarama* v. *Venkayya*[2], of much help. It was there decided that section 189 (3) of the Madras Estates Land Act can only have application to cases where the Revenue Court has exclusive jurisdiction in respect of disputes or matters which arise in other proceedings.

But it appears to us to be most anomalous, to say the least of it, that the State, which has allowed the order of the Appellate Tribunal holding that the grant is not of the whole village, and, therefore, it would not be an estate, to become final, should be allowed to make a notification under the Rent Reduction Act on the footing that the grant is of a whole inam village. It was open to the State to have challenged the correctness of the Tribunal's decision. But the State was not evidently prepared to do so. Having acquiesced in that decision, we think it is not open to the Government to sustain a notification under the Rent Reduction Act which is obviously wrong if the ground of the decision of the Tribunal is right.

For this reason we agree with Subba Rao, J., that the order of the Government should be quashed.

It follows that these three appeals by the Government fail and they are dismissed with costs.

Advocate's fee Rs. 50 in each.

K.S. *Appeals dismissed.*

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[1] (1952) 2 M.L.J. 194 : I.L.R. (1952) Mad. 680.

[2] (1954) 2 M.L.J. 1 : I.L.R. (1954) Mad. 715 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

M. Sakkarama Rao .. *Appellant**

v.

M. Nagasami Rao and others .. *Respondents.*

Contract Act (*IX of* 1872), *section* 45—*Applicability—Mortgage—Co-mortgagees—Mortgaged property put in possession of one of two co-mortgagees allowing him to recover income and appropriate same towards principal and interest due under mortgage—Income during period of possession more than sufficient to discharge entire debt—Effect—Other co-mortgagee, if bound—Discharge of debt.*

Discharge of a mortgage by allowing mortgaged property to be in possession of a co-mortgagee would amount to payment to a joint promisee. Where under an arrangement between the parties one of two co-mortgagees is put in possession of the mortgaged property allowing him to appropriate the income of the property towards the principal and interest, and the income of the property, during the period of such possession, is more than sufficient for the discharge of both the principal and interest due under the mortgage, that is a payment which would discharge the debt and would be binding on the other co-mortgagee.

Barber Maran v. *Ramana Goundan*, (1897) 7 M.L.J. 269 : I.L.R. 20 Mad. 461 and *Ramaswami* v. *Kottayya*, (1924) I.L.R. 48 Mad. 893 : 47 M.L.J. 840, distinguished.

Appeals against the Decree of the District Court of Chingleput in Appeal Suits Nos. 150 and 151 of 1953 respectively preferred against the Decree of the Court of the District Munsif of Tiruvellore, in Original Suits Nos. 169 and 170 of 1952, respectively.

T. S. Narasinga Rao and *M. Balachandrudu* for Appellant.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—The short point for determination in this appeal is as to whether the discharge of a mortgage by allowing the property to be in possession of a co-mortgagee would amount to a payment to a joint promisee. The plaintiff and the 3 defendants were co-mortgagees of the suit property, the 2nd defendant being the mortgagors' representative. It was found that the property was in the possession of the 3rd defendant for a period of five years, during which period the income of the property was appropriated by the 3rd defendant. It was found by the Court below and in a previous proceeding that the income of the property was more than sufficient for the discharge of the principal and interest due on the mortgage. In view of the discharge of the mortgage being effected though not by payment not actually made by the mortgagor but by allowing the co-mortgagee to be in possession of the property and to recover the income the lower Court found that it would amount to a payment of the amount due under the mortgage to the co-mortgagee.

It is urged by Mr. Balachandrudu that what could discharge the mortgage is the actual payment to a co-mortgagee and not an arrangement under which the co-mortgagee has to enjoy the property, with the income of which the mortgage might not be discharged. The mere fact that payment has not been made in a lump sum and the payment in this case was obtained from and out of the income of the property, though spread for a period of time, would not affect the nature of the payment, since it was in any event a payment towards the mortgage, though not voluntarily paid but appropriated from and out of the income of the property. The decision in *Barber Maran* v. *Ramana Goundan*[1], followed in *Ramaswami* v. *Kotayya*[2], goes to establish that in order that one of several joint promisees could give a valid discharge of a debt so as to bind all the promisees, the promisor must make an actual payment to him of the debt and that a mere undertaking to pay him the amount at some future date cannot deprive the other promisees of their right to sue for the debt. There is no such undertaking here but an actual payment, payment made out of the income of the property to recover possession by the mortgagor, which would in law be sufficient to constitute a payment to the co-mortgagee. The view taken, therefore, by the lower appellate Court that this is a payment, which would bind the plaintiff, is correct, and it does not require any interference. These second appeals are dismissed with costs in S.A. No. 784 of 1954.

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*Second Appeals Nos. 784 and 785 of 1954. 16th July, 1956.

[1] (1897) 7 M.L.J. 269 : I.L.R. 20 Mad. 461. . (1924) 47 M.L.J. 840 : I.L.R. 48 Mad 693.

No leave.

P.R.N. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P.V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

N. Ramaswamy .. *Appellant**.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949), *section* 5 (1) (d)—*Applicability—Wife guilty of physical violence—Husband finding it impossible and unpleasant to live with wife—Absence of evidence that husband's life was endangered—Right to dissolution of marriage.*

In order to entitle a husband to have a dissolution of marriage under section 5 (1) (*d*) of Madras Act VI of 1949, the applicant must make out that his life was endangered as a result of the cruelty of the wife. The fact that the applicant finds it most unpleasant, if not miserable, to live with the respondent, or that he finds it impossible to live with her would not by itself justify a finding that the respondent is guilty of such cruelty as to render it unsafe for the applicant to live with her, although on occasions the respondent has even used physical violence, when, obviously, the applicant's life was never endangered.

Appeal under clause 15 of the Letters Patent against the order of Ramaswami, J. dated 7th December, 1955 and made in A.A.O. No. 108 of 1954 preferred against the order of the City Civil Court at Madras, dated 10th April, 1953 and made in O.P. No. 188 of 1951.

V. Tyagarajan, T.T. Srinivasan and *A.N. Rangaswami* for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—We agree with the learned Judge that the petition filed by the appellant for dissolution of his marriage with the respondent should be dismissed. But it should not be understood that we agree with all that is contained in the judgment under appeal. Assuming that the respondent, the wife, was guilty of the several acts mentioned by the learned trial Judge in paragraph 14 of his judgment, in our opinion that would not suffice to bring the case within clause (*d*) of section 5 (1) of Madras Act VI of 1949, namely,

> " has been guilty of such cruelty as to render it unsafe for the petitioner to live with the other party ".

We are prepared to say that the appellant finds it most unpleasant, if not miserable, to live with the respondent. We will go even further and say that he finds it impossible to live with her. But that by itself would not justify a finding that the respondent is guilty of such cruelty as to render it unsafe for the appellant to live with her. It may be that on occasions she has even used physical violence ; but it is obvious that the appellant's life was never endangered. In our opinion the appellant has not made out a case which would entitle him to the relief on the ground mentioned in clause (*d*) of section 5 (1) of the Act and therefore his petition must be dismissed. The appeal is dismissed.

P.R.N. *Appeal dismissed.*

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* L.P.A. No. 52 of 1956. 6th August, 1956.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Thayoth Puthiyapurayil Ayisomma .. *Appellant**

v.

Choolat Puthiyapurayil Kunhali and others .. *Respondents.*

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 84—*Jurisdiction of the civil Court—When ousted —Dispute only between two private parties as to whether a particular institution was a public temple or not—Jurisdiction of civil Court.*

A civil Court has jurisdiction to decide whether a particular institution is a public temple or not when such a question arises incidental to other disputes in the case before the Court. The dispute referred to in section 84 is a dispute between the trustee of an institution on the one hand and the Board on the other. The section does not bar either expressly or impliedly the jurisdiction of the civil Court when the dispute is not with the Board but between two private parties.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of Rajamannar, C. J., dated 13th December, and passed in S.A. No. 1396 of 1948 preferred against the decree of the District Court of North Malabar in A.S. No. 193 of 1947 (O. S. No. 513 of 1945, District Munsif's Court, Kuthurparamba).

K. Kuttikrishna Menon and *A. Atchuthan Nambiar* for Appellant.

O.T.G. Nambiar for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—We agree with the learned Chief Justice that a civil Court has jurisdiction to decide whether a particular institution is a public temple or not when such a question arises incidental to other disputes in the case before the Court.

But the more important question which was strongly pressed upon me by Mr. Atchuthan Nambiar, learned counsel, for the plaintiff-respondent was that the ordinary civil Court in its original jurisdiction had no power to adjudicate upon a dispute whether a particular temple is or is not a temple within the meaning of Madras Act II of 1927 and it is only the Board that could in the first instance adjudicate on the dispute. Even thereafter the aggrieved party could only file an application to the District Court. This, it was contended, followed from the provisions of section 84 of the Act.

The argument of Mr. A. Achuthan Nambiar for the respondent, if I understood him aright was that whenever there was any dispute between any parties in any connection as to whether a particular temple was or was not a temple as defined in the Act no Court had jurisdiction to decide that dispute and it was only the Board that was competent to decide it. According to this argument it did not matter that one of the parties to the dispute was or was not the Board itself. When I asked him what practical result would follow from such a state of law, that is to say, what should happen if incidentally in a suit between parties this question arose, learned counsel was unable to give a satisfactory reply. At one time he suggested that the suit must be dismissed, if it was necessary to establish the fact that a temple was a public temple. At another time he said that the question should be referred to the Board. I am unable to see under what provision an oridinary civil Court, say a Munsif's Court, will have jurisdiction to make a reference to the Board and compel the Board to take up the matter on file and submit its decision to the Court. It may be that the Board in a particular case may not at all be interested in deciding the dispute. Apart from any consideration of practical difficulty, I am clearly of opinion that on a reasonable construction of section 84 the contention of the respondent is untenable. I think that the dispute referred to in section 84 is a dispute between the trustee of an institution on the one hand and the Board on the other. In such a case the Act specially provides that the dispute shall be decided by the Board in the first instance, and it is only thereafter that the District Judge is given the right to set aside or modify or confirm such decision. It will not be open to an aggrieved person to file a suit against the Board for a declaration that a particular temple is not a temple within the meaning of the Act and therefore the Board had no jurisdiction in respect of it. The decisions relied upon by learned counsel for the respondent support him only thus far. In *Iswarananda Bharathi Swami* v. *Commissioners, H.R.E. Board*[1], the Board after holding an enquiry passed an order that a particular building was a math within the meaning of the Act. Then the trustee filed a suit for a declaration that it was not an institution coming under the Act. It was held by a Division Bench of this Court (Curgenven and Cornish, JJ.) that such a suit was not maintainable. The learned Judges applied the well-established principle that when by an Act of the Legislature powers are given to a person for a public purpose from which an individual may receive injury and when the mode of redressing the injury is also pointed out by the statute, the jurisdiction of the ordinary Court is ousted. The *ratio decidendi* of this case is to be found in the following words of Cornish, J. :—

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* Letters Patent Appeal No. 193 of 1952. 16th August, 1956.

> "The mode of redress open to the plaintiff in respect of the interference with his rights by the Board's Order is definitely provided by section 84 (2) of the Act, *viz.*, an application to the District Court. In our opinion, therefore, it is not open to him to seek redress by means of this suit ".

The decision in *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Aiyar*[2] is instructive. The basis of the decision in this case is that it is within the competence of the Hindu Religious Endowments Board to determine whether a math or temple is one to which the Act applies, and where there is a dispute between the trustee or Matathipathi and the Board the Act gives the Board the power to determine this question subject to the right of the trustee to apply to the Court to modify or set aside the decision of the Board. There is nothing in this decision to countenance the view that even when the dispute is not with the Board, but there is a dispute between two private parties, the ordinary civil Court has no jurisdiction to decide the dispute, but it is only the Board which is competent to decide it. There is no such express or implied bar of the jurisdiction of the civil Court in section 84 of the Act.

The learned District Judge lightly brushed aside the whole argument based on section 76 of the Act with the remarks :

> " Whether the temple is an excepted temple and whether the sanction of the Religious Endowments Board is necessary are not germane for the disposal of this suit ".

The learned Judge has evidently not fully comprehended the plea of the defendants. If the Devaswom was a temple within the meaning of the Act, any sale of immovable property belonging to the Devaswom would not be valid or operative without the sanction of the Board. As I have held that the Devaswom is a temple within the meaning of the Act and as admittedly sanction of the Board has not been obtained the sale in favour of the plaintiff must be declared to be invalid and inoperative.

What happened in this case was that the plaintiff's witnesses themselves admitted that the temple in question was one to which Hindus as a matter of right resort for purpose of worship, in which case it was a temple as defined in section 9 (12) of the Madras Hindu Religious Endowments Act, and if that is so, any assignment of such temple property would not be valid. We do not think that the difficulties visualised by Mr. Kuttikrishna Menon actually would arise in the particular case. When once this Court agreeing with the Court below, holds that the institution is a public temple, it is next to an impossibility that the Hindu Religious Endowment Board would come to a different conclusion in order to create conflict of decisions. We are in entire agreement with the observations of the learned Chief Justice and it is not necessary to reiterate the reasons given by him in his judgment.

The Letters Patent Appeal is dismissed with costs.

V.S. —— *Appeal dismissed.*

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1. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928. 2. (1928) 55 M.L.J. 605.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

V. S. Balasundara Mudaliar and others .. *Appellants**

v.

E.N. Ellappa Mudaliar .. *Respondent.*

Madras Shops and Establishments Act (XXXVI of 1947), *section* 41—*Scope—Termination of services of employee—Duty of employer—"Reasonable cause"—Meaning of—Charge of misconduct—Necessity for inquiry and proof—Mere notice—Sufficiency.*

Under section 41 of the Madras Shops and Establishments Act, it is incumbent upon an employer to show that there was reasonable cause for dispensing with the services of an employee and a mere notice is insufficient; and if the dispensing of the services is for any misconduct, an inquiry must be held and the charge of misconduct supported by satisfactory evidence. Where neither of these conditions is complied with, a termination of services cannot be supported, and the termination being wrongful, the employee must be deemed to continue in service and is entitled to salary.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A.S. No. 64 of 1953 preferred against the decree of the Court of the District Munsif of Arni in O.S. No. 608 of 1951.

Facts :—The appellants who were running a talkie house employed the respondent as chief operator on a monthly salary of Rs. 90 from 9th April, 1948. They suddenly terminated his services on 5th January, 1951. The respondent took the matter before the Commissioner for Workmen's Compensation under the Madras Shops and Establishments Act (1947). The Commissioner held that the discharge was not for a reasonable cause and set aside the order on 17th July, 1951. He found that section 41 of Madras Act XXXVI of 1947 was not complied with. The appellants also contended that the respondent's services were also dispensed with for misconduct, but that charge was not inquired into nor was any satisfactory evidence adduced in respect of it at any inquiry held on that charge.

Both the lower Courts held that the respondent's service's had not been validly terminated and that he was entitled to salary from 5th January, 1951, as he must be regarded to be still in service.

V. V. Raghavan for Appellants.

T. R. Ramachandran for Respondent.

The Court delivered the following

JUDGMENT.—On both the points, the lower appellate Court has rightly concurred with the findings of the trial Court, that is, as to the wrongful termination of the services and as to the plaintiff's right to recover salary. Section 41 (of Madras Act XXXVI of 1947) is clear that it is incumbent on the employer to show that there was reasonable cause for dispensing the services of a person and a mere notice is insufficient; and if the dispensing of the sevices is for any misconduct, an enquiry must be held and the charge of misconduct supported by satisfactory evidence. Neither of these conditions has been complied with and the termination, therefore, of the services of the plaintiff could not be supported. I do not think that to claim salary for the period subsequent to the wrongful termination of services, any declaration is necessary. The view which found favour with the lower appellate Court is that by reason of the finding that the termination of the services was wrongful, the employee continues in service and he is entitled to salary and not for damages. The second appeal fails and is dismissed with costs.

No leave.

P.R.N. *Appeal dismissed.*

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* S.A. No. 115 of 1954. 14th August, 1956.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU.

Nemiraja Kottari .. *Appellant**

v.

Kinni *alias* Kanthamma and others .. *Respondents.*

Mesne profits—Liability for—Rival claimants to immovable property—Lessee under one of them put in possession and paying rents to him—Title of latter ultimately found against and the other declared entitled to the property—Claim for mesne profits—Liability of lessee from person whose title was ultimately found against—Lessee, if trespasser.

The title to the suit land was in dispute between the plaintiff and defendants 1 to 3. The latter had leased the property to the fourth defendant who was put in possession by them and who paid the rents to them. Subsequently the plaintiff was declared entitled to the suit property and he claimed mesne profits from all the defendants. The 4th defendant pleaded that he was put in possession by defendants 1 to 3 and that he, having paid the rents to them, was not liable to the plaintiff for any mesne profits.

Held: that the 4th defendant could not be held to be a trespasser and was therefore not liable for mesne profits of the property, the persons liable being those who put him in possession and whose title was ultimately found against. Even the defendants 1 to 3 could not be treated as trespassers.

Gurudas Kundu Chandhuri v. *Hemendra Kumar Roy*, (1929) 58 M.L.J. 74 : I.L.R. 57 Cal. 1 : L.R. 56 I.A. 290 (P.C.).

R. C. M. D. T. C. Society v. *Nayudu Kotayya*, (1954) 2 M.L.J. (Andhra) 141, rel. on.

Appeal against the decree of the District Court of South Kanara in Appeal Suit No. 236 of 1952 preferred against the Decree of the Court of the Subordinate Judge of South Kanara in R.I.A. No. 20 of 1951 in Original Suit No. 189 of 1950.

T. Krishna Rao for Appellant.

K. Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of proceedings instituted for enquiring into the mesne profits in pursuance of a decree for possession granted in favour of the plaintiff against defendants 1 to 3. The title to the suit property was in dispute between the plaintiff and defendants 1 to 3; and the suit property was leased to the 4th defendant under Exhibit B-1, dated 26th February, 1944. Subsequently on 19th July, 1949, the plaintiff was declared entitled to the suit property. The title in favour of the plaintiff having been upheld a decree for possession was passed against defendants 1 to 3; but the person who was in actual possession was the 4th defendant the present appellant. In the application for ascertaining the mesne profits the plaintiff claimed mesne profits from all the defendants, *viz.*, defendants 1 to 4. The 4th defendant's contention is that in so far as he is concerned he was put in possession by defendants 1 to 3, that he has paid the rents to them, that he is not liable and that the right of the plaintiffs to recover could therefore be only against defenants 1 to 3. The Courts below, however, rejected that contention, and held that all the defendants are liable. It is urged that this view is wrong especially in view of the decision of the Privy Council in *Gurudas Kundu Chaudhuri* v. *Hemendra Kumar Roy*[1], where a person in the position of the 4th defendant was held not to be a trespasser and not liable for mesne profits of the property, the persons who are liable being those, who put him in possession and whose title was eventually found against. The Privy Council case is referred to in the judgment of Chandra Reddy, J., in *R.C.M.D.T.C., Society* v. *Nayudu Kotayya*[2]. The liability of a person in the position of the 4th defendant could not therefore be as a trespasser, he having paid the rents to the persons who put him in possession and even the persons, who put him in possession and who held the property until their title was found against and in favour of the present plaintiffs, could not be treated as trespassers.

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* S.A. No. 2020 of 1953. 3rd August, 1956.

[1] (1929) 58 M.L.J. 74 : L.R. 56 I.A. 290 : I.L.R. 57 Cal. 1 (P.C.).

[2] (1954) 2 M.L.J. (Andhra) 141.

There is no dispute, however, as regards the quantum of profits actually paid by the 4th defendant; and there cannot be any liability on the part of the 4th defendant, if it is shown that he has paid the rents to defendants 1 to 3 in pursuance and as per the terms of Exhibit B-1. The lower appellate Court found that except the filing of Exhibit B-2 there is no evidence to show that the 4th defendant had dischaged his liability under the lease deed Exhibit B-1, and that the recital in Exhibit B-2 cannot be taken in support of the 4th defendant's contention that the rents have been paid to defendants 1 to 3. Exhibit B-2 is a deed of surrender, which the 4th defendant executed in favour of defendants 1 to 3 on 8th March, 1950 and which conclusively proves that the outstanding questions as to rents and deposit have been settled and that the 4th defendant was repaid as per the particulars in Exhibit B-2 the sum of Rs. 3,000 received as deposit. There is no need for further evidence as the payment is not contested by defendants 1 to 3. So long as defendants 1 to 3 do not deny the statement of the 4th defendant that he has paid rents and surrendered the property the truth or otherwise of the 4th defendant's statement cannot be questioned, and if there is any doubt as to the payment by the 4th defendant, Exhibit B-2 sets at rest the same. I am satisfaed that there can be no liability on the part of the 4th defendant in the circumstances. The appeal is allowed with costs.

No leave.

P.R.N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

C. Subramaniam .. *Petitioner**

v.

Pakkiriswami Vandayar and others. .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 63—*Applicability—Suits against same debtor in superior and inferior Courts—Attachment of same fund before judgment in both —Decrees in both Courts—Execution taken out in inferior Court after decree —No execution taken in superior Court after decree—Power of superior Court to adjudicate on claim of attaching decree-holder in inferior Court.*

Section 63, Civil Procedure Code, would apply and would give power to a superior Court to adjudicate on claims of rival attaching decree-holders only in cases where there have been attachments of the same fund in execution of decrees of more Courts than one. Where the superior Court has made only an order for attachment of the fund before judgment and no execution has been taken out in pursuance of the decree made in the suit in the superior Court which ordered an attachment before judgment, it cannot be said that the superior Court has attached the amount in execution of the decree passed by that Court, and therefore section 63, Civil Procedure Code, does not apply and would not give the superior Court any power to adjudicate upon the claim of an attaching decree-holder in an inferior Court who has taken out execution proceedings in the inferior Court.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Tanjore, dated 29th July, 1955 and made in E.A. No. 369 of 1955 in O.S. No. 50 of 1954.

T. S. Kuppuswami Ayyar and *K. Janakiraman* for Petitioner.

V. Venkataseshayya for Respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the District Munsif of Tanjore in E.A. No. 369 of 1955 on his file. The contention put forward by Mr. T.S. Kuppuswami Ayyar, for the petitioner, is that the lower Court failed to exercise a jurisdiction vested in it by law by refusing to comply with the application for the issue of a cheque and that if I am satisfied that the learned District Munsif has misdirected himself with regard to the provision of law applicable then the order of the lower Court has to be set aside.

The short facts which have led up to this petition are as follows:—In O.S. No. 50 of 1954 on the file of the District Munsif, Tanjore, the petitioner, Subramaniam, filed a suit for recovery of a sum of money against the respondent, one Pakkiriswami Vandayar, and pending decision obtained an attachment before judgment of certain monies due to this Pakkiriswami Vandayar from Raja Mirasdar Hospital, Tanjore. There was no dispute that there was an attachment before judgment and that it was confirmed. After the suit was decreed the petitioner applied in execution for confirmation of the attachment which had been effected prior to the decree. As a result of it, the District Munsif directed the garnishee to produce the money in Court by an order dated 20th April, 1955. In pursuance of that order the garnishee produced the money in the Court on 20th June, 1955. In the meanwhile, third parties Mayuranathan and Palani Andi had filed a suit against the same Pakkiriswami Vandayar for the recovery of sums of money by O.S. No. 14 of 1955 in the sub-Court of Tanjore and pending that there was an order of attachment before judgment of the same amount. The suit was decreed on 14th June, 1955, but no execution was taken out in pursuance of the decree obtained by Mayuranathan and Palani Andi.

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*C.R.P. No. 815 of 1955. 3rd August, 1956.

In this state of things, when the money came to the custody of the District Munsif's Court, Tanjore, a petition I.A.No. 283 of 1955 on the file of the Subordinate Judge's Court, Tanjore, was filed for the raising of the attachment before judgment effected by the sub-Court. The learned Judge in that order in paragraph 6 says as follows:

> "Inasmuch as this Court has also attached the fund in question and this Court is the superior Court, this Court is entitled to have the fund sent over to this Court".

It is on that ground that the application for raising the attachment before judgment in O.S. No. 14 of 1955 was dismissed by the Subordinate Judge. The application for the issue of the cheque was dismissed by the District Munsif relying upon the above order of the Sub-Judge.

It is contended by Mr. Kuppuswami Ayyar that the learned Judge has failed to understand the implications of section 63, Civil Procedure Code, which gives the superior Court the power to adjudicate as regards claims of rival attaching decree-holders only in cases where the attachments have been in execution of decree of more Courts than one. In the present case there is no doubt whatever that the Subordinate Judge of Tanjore has not attached this amount in the possession of the garnishee in execution of the decree in O.S. No. 14 of 1955. Therefore, the order of the Subordinate Judge dismissing the appliction for raising the attachment would not prevent the present petitioner from asking for the issue of a cheque in his favour. If the Subordinate Judge had attached the same amount in execution of the decree in O.S. No. 14 of 1955 then that Court as the superior Court would have been entitled to adjudicate as regards the rival claims. In the absence of any attachment in execution, the order of the District Munsif sending the money to the sub-Court without issuing a cheque to the petitioner is *ultra vires* and without jurisdiction.

The order of the Lower Court is, therefore, set aside and the District Munsif is directed to issue a cheque in favour of the petitioner by getting back the money from the sub-Court, if it had been sent there. No order as to costs in this petition.

P.R.N. *Revision allowed. Order set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

The Mysore City Hotels Association, representing Managements of 7 Hotels in Mysore City and others .. *Petitioners**

v.

The Labour Appellate Tribunal of India, Madras II Bench and another. .. *Respondents.*

Industrial Dispute—Demand for bonus—Claim of workers belated—Claim for bonus for any year long after the closing of the year's account—Maintainability—Jurisdiction of Appellate Tribunal.

It is a well settled principle that bonus is allowed to workers in an establishment from the profits of any particular year for which it is claimed. As it would not be possible to re-open settled accounts, a claim for bonus for any particular year long after the year has ended and the accounts have been closed will be belated and the Tribunal would be justified in rejecting such a belated claim. It is true that the mere fact that a claim is belated does not oust the jurisdiction of the Tribunal. But the exercise of the jurisdiction might be vitiated in certain cases under certain circumstances if the Tribunal ingores the well-settled principle that a belated claim for bonus should not be investigated.

Muir Mills Company v. *Suti Mills Mazdoor Union*, 1955 S.C.J. 214 : (1955) 1 M.L.J. (S.C.) 127 : 1955 An.W.R. (S.C.) 127, referred.

Writ petition under Article 226 of the Constitution of India, presented to the High Court, for issue of a writ of *certiorari*, calling for the records relating to the order of the 1st Respondent, *viz.*, the Labour Appellate Tribunal of India, Madras II Bench, dated 22nd December, 1955, in Appeal No. III-589 of 1953, and to set aside the same.

R.M. Seshadri for Petitioners.

Parasaran for *D. R. Krishna Rao* and *V. Sriramamurthi* for 2nd Respondent.

The Court made the following

ORDER.—On 15th December, 1949, the Secretary of the Mysore City Hotel Workers' Association preferred a demand on behalf of the Workers in 61 hotels in the City, that the employers should pay their workmen four months wages as bonus. An attempt at conciliation failed. On 8th December, 1951, the Government of Mysore referred the question as an industrial dispute under section 10 (1) (*c*) of the Industrial Disputes Act for adjudication by the Industrial Tribunal, Bangalore. It should be noticed there were other items of dispute also, but I am concerned at this stage only with the claim for bonus as an industrial dispute. It should also be noticed at this stage that both before the Industrial Tribunal and before the Appellate Tribunal the claim was treated as one for bonus for the year 1947-48, that is, for the period of 12 months ending with 30th June, 1948.

The Industrial Tribunal by its award, dated 22nd October, 1953, negatived the claim for bonus, principally on the ground that it was belated and was preferred long after the period for which the bonus was claimed, and elapsed. The Worker's Union appealed to the Labour Appellate Tribunal. A number of concerns originally involved in the dispute had by then closed down, and the appeals against them were not pressed. Eventually in the case of the seven petitioners before men the Appellate Tribunal reversed the award of the Industrial Tribunal and directed payment of bonus at varying rates.

The petitioners challenged the validity of the decision of the Appellate Tribunal, dated 22nd December, 1955, by an application under Article 226 of the Constitution for the issue of a writ of *certiorari*. The validity was attacked mainly on two grounds: (1) It was not legally permissible for the Appellate Tribunal to maintain a demand on behalf of wrokmen for bonus long after the relevant year had terminated; and (2) there was no proof of any available surplus in the hands of any of the seven petitioners for any distribution of bonus to its workers.

The Appellate Tribunal itself recorded in paragraph 12 of its order :

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*W.P. No. 66 of 1956. 4th October, 1956.

> "No doubt if the claim for bonus is made long after the year for which the bonus is claimed has ended and the accounts have been closed, the Tribunals would be justified in rejecting such a belated claim".

That was the principle the Labour Appellate Tribunal laid down in *Kasi Iron Foundry and others and Their Workmen*[1].

> "It is a well known principle that the bonus is allowed from the profits of the year for which it is claimed and it would not be possible to reopen the accounts of the previous years. . . . . The employees pleaded that as there was no Union they had no opportunity to raise their demands. But this would not entitle them to raise a belated demand".

As the learned counsel for the petitioner pointed out, that principle was consistently followed by the Appellate Tribunal. See *Burmah Shell Oil Co.* v. *Their Employees*[2]; *Associated Electrical Industries India Limited* v. *Employees Welfare Association and Associated Electrical Industries India Limited*[3]; *Forbes Forbes Cambell and Company, Limited* v. *Their Workmen*[4]; *Haji Abdul Kaliq Steel Trunk Factory and others and Their Workmen*[5]. It was a similar principle that the Labour Appellate Tribunal applied in *Caltex India Ltd.* v. *Their Employees*[6].

The learned counsel for the petitioners referred to *Muir Mills Company* v. *Suti Mills Mazdoor Union*[7]. At page 175 their Lordships laid down:

> "On the accounts of each year being made up, and the profits of the industrial concern being ascertained, the workers during the particular year have their demand for bonus fully satisfied out of the surplus profits and the balance of the profits is allocated and carried over in the accounts. No further claim for payment of bonus out of those reserves or undistributed profits can therefore survive."

At page 176 their Lordships pointed out that in the case before them the Appellate Tribunal did not even apply the formula it had evolved to the facts of that case. But it should be remembered that the case before the Supreme Court was one that came up by way of appeal with special leave.

The learned counsel for the petitioner at one stage contended that the Appellate Tribunal had no jurisdiciton at all to direct the grant of bonus, if the claim for the bonus was preferred long after the close of the year to which the claim related, that is, long after the accounts for that year had been made up by the employer. I am unable to accept this contention, that the Labour Appellate Tribunal is divested of its jurisdiction merely because the claim is a belated one. It is, however, a totally different question, whether the exercise of that jurisdiction was vitiated by ignoring the well settled principle of adjudication by Labour Appellate tribunals especially, in view of the fact, that the Labour Appellate Tribunal in this case did not intend to depart from that principle which had been well defined.

The Appellate Tribunal observed :

> "We shall therefore examine whether the circumstances and facts of the present case justify the upholding of the plea of belatedness raised by the Association of Hotel Owners".

Eventually it came to the conclusion :

> "In the circumstances and also considering that the demand was made against the Association of which a majority of hotels were members on 15th December we are not prepared to shut out the claim of the workmen on the ground of belatedness."

The Appellate Tribunal pointed out that the majority of the hotel-workers were illiterate and were unorganised till February, 1947. Apparently the Labour Appellate Tribunal overlooked the fact, that in *Kasi Iron Foundry and others and Their Workmen*[1], to which they referred and the principle laid down in which they purported to follow, the Labour Appellate Tribunal had specifically pointed out that the fact that the employees had no Union "would not entitle them to raise belated demand", virtually that would be an irrelevant factor. The other factor on which the Labour Appellate Tribunal relied was that the employers had not taken up the plea of belatedness in the statements they filed before the Industrial Tribunal. Nonetheless that was one of the main issues debated before the Industrial Tribunal, and the Industrial Tribunal upheld the plea of the employers.

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[1] (1952) 1 L.L.J. 199 at 202.
[2] (1954) 1 L.L.J. 21.
[3] (1954) 1 L.L.J. 790.
[4] (1954) 2 L.L.J. 477.
[5] (1955) 1 L.L.J. 282.
[6] (1952) 2 L.L.J. 183.
[7] (1955) S.C.J. 214 : (1955) 1 M.L.J. (S.C.) 127 : 1955 An.W.R. (S.C.) 127 : A.I.R. 1955 S. C. 170 (175).

The appellate Tribunal was bound to adopt a consistent standard. In fact, as I have already pointed out, in this case the Appellate Tribunal did not purport to depart from the principle laid down in *Kasi Iron Foundry and others and Their Workmen*[1]. In the present case, it should be remembered the year to which the claim for bonus related ended on 30th June, 1948. It was more than 17 months after, on 15th December, 1949, that the demand for bonus was made for the first time. The Appellate Tribunal itself was aware of the fact that in the case of one of the petitioners before it, which was a partnership concern, the profits had been ascertained and distributed. The difficulty of reopening the accounts long after they had been closed, the profits ascertained and even appropriated was realised when the Labour Appellate Tribunal evolved the principle, that a belated claim for bonus should not be investigated. That had received the approval of the Supreme Court when they pointed out that the 'claim did not survive'.

In my opinion the contention of the petitioner's learned counsel is well founded that the exercise of the jurisdiction the Appellate Tribunal had was vitiated by the Tribunal, in effect, flouting the principle which it purported to apply to the facts of the case.

The next contention of the learned counsel for the petitioner was that if the claim for bonus could not be rejected on the ground that it was belated, the Appellate Tribunal erred in directing the payment of bonus without any real attempt to find out if surplus profits were available. The principles on which the available surplus could be computed were laid down by the Labour Appellate Tribinal in *Mill Owners Association, Bombay* v. *The Rashtriya Mill Mazdoor Sangh, Bombay*[2]. It may not be necessary to set them out in detail at this stage. That was again a principle which the Appellate Tribunal purported to keep in view. What happened in the case was they called upon the learned counsel who appeared for the employers to file a statement showing the available surplus profits. It was on that basis the Labour Appellate Tribunal determined the quantum of bonus payable by each of the employers. It may not be open to the petitioners to challenge the correctness of the statement that was filed on their behalf by their advocate. Nor will it be open to me to verify within the scope of the limited jurisdiction vested in this Court by Article 226 of the Constitution, whether the computation of the surplus profits available to each of the employers, made by the employers themselves and accepted by the Appellate Tribunal, was correct.

Though the second ground of attack fails, the first, in my opinion, succeeds.

This petition is allowed and the rule is made absoulte. The Order of the Appellate Tribunal, dated 22nd December, 1955, is set aside. Their will be no order as to costs.

R.M.

Petition allowed and
rule made absolute.

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[1] (1952) 1 L.L.J. 199.

[2] (1950) 2 L.L.J. 1247.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU.

Mathamangalath Ananthanarayana Vyaghram Subramania Iyer's eldest son Sivaramakrishna Iyer, Manager of his family of Payyannur amsom, desam .. *Appellant**

v.

Abdul Khadar's children Kanukkarathiyute Mammi of Kerom amsom Maniyara desam and others .. *Respondents.*

Private International Law—Jurisdiction of Courts—Decree charging foreign immoveable property—Effect.

It is a well-recognised principle of International Law that no Court has jurisdiction in respect of immoveable property situated in a foreign territory and no degree can be passed by Courts of one country either charging foreign immoveable properties or recognising a mortgage over such properties and passing a mortgage decree. Where an action is *in personom* and the obedience of the decree could be compelled by the Court personally against the judgment-debtor by directing him to collect and deposit into Court the rents and profits of properties, etc., the jurisdiction of Court could extend to such cases even though the properties may be situated in a foreign territory. But there can be no decree of a Court creating a right or interest over immoveable property situated in a foreign territory so as to enable the decree-holder to proceed against such properties in execution. A decree of a Court in the former Travancore State obtained by a junior member of a tarwad for maintenance cannot be executed against the properties of the tarwad in the then British Indian territory even if the decree created a charge over such properties.

Appeal against the Decree of the District Court of North Malabar in Appeal Suit No. 393 of 1950, preferred against the Decree of the Court of the District Munsif of Taliparamba in Original Suit No. 260 of 1948.

V. P. Gopalan Nambiar for Appellant.

A. Achuthan Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for possession, the plaintiff's father having purchased the suit properties in a Court sale under Exhibit A-1, dated 24th June, 1943. The properties were brought to sale in execution of the decree in Original Suit No. 44 of 1095 M.E., of the Travancore State. That suit was a suit for maintenance by a junior member of a Marumakathayam tarwad for maintenance against the members of the Kovilagam. It was filed in the District Court, Kottayam in the Travancore State. The decree was for arrears of maintenance and the future maintenance, the amount awarded to the plaintiff decree-holder in that suit and the future maintenance was declared a charge on the tarwad properties. It is common ground that the tarwad properties were not specified in the decree. The Kovilagam owned properties both in the Travancore State and in Birtish India in North Malabar. The plaintiff in O.S. No. 44 of 1095 had the decree in the Travancore Court transmitted to the District Court of North Malabar and filed a petition for enforcement of the charge in execution by sale of the properties of the tarwad situated in the district of North Malabar. Sale was ordered and in pursuance of that sale, the plaintiff had become the purchaser. Symbolical possession was granted to him and the present suit is to recover actual possession.

The main defences to the action were that the charge created on the tarwad properties by the Travancore Court did not relate to the properties outside the Travancore State, and, in any event, such a decree is void and unenforceable, as no decree could be passed in respect of immoveable properties situated in a foreign State. The decree having been passed in 1920, corresponding to 1095 M.E., the Travancore State was not part of the Indian Union. The question, therefore, would be whether such a decree could be upheld as creating any rights in the decree-holder for enforcement of the charge on properties outside the Travancore State.

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*Second Appeal No. 2569 of 1952. 16th February, 1956.

The trial Court rejected the contention of the defendants and granted a decree for possession. In appeal the learned District Judge held that the decree did not really create a charge over properties in British India, and secondly, it could not, in law, affect properties in British India. With both these findings I am in entire agreement.

From the decree, Exhibit A-4, it is seen that the amount awarded to the plaintiff is declared a charge on the tarwad properties. There was nothing to show that the plaintiff sought to ask for a charge against the properties of the tarwad situated outside the Travancore State since there was no description or particulars of the tarwad properties shown in the decree. Presumably, therefore, the plaintiff in that suit could have asked for a charge on the tarwad properties situated within the jurisdiction of the Travancore Courts. In the absence of any specific reference creating a charge over properties outside the State and in British India, there is no reason to assume that a charge is created in respect of properties of the tarwad wherever they may be situated, notwithstanding that they are outside the jurisdiction of the Travancore State. This will be sufficient to dispose of the appeal.

But, Mr. Nambiar, howerver, contended that even the other finding of the learned District Judge that the decree of the Travancore State creating a charge over properties in British India could not, in law, affect such properties is not correct. For this he relied upon certain passages in Halsbury which he considered supported his contention. The passages referred are in 6 Halsbury's Laws of England, Hailsham's Edition. At page 220 (Paragraph 269) it is stated :

> " Where, however, it is only necessary to determine the question of title incidentally, an action relating to rights in respect of a foreign immoveables will lie in England. Thus, where a fund is in Court representing the proceeds of sale of foreign immoveables, and it is necessary to decide who is entitled to it, an action will lie ; and where there is a contract relating only indirectly to foreign immoveables, such as a covenant to pay rent or an agreement to contribute part of the cost of works to be undertaken on the land, the Court has jurisdiction, and where, according to the local law, there is an obligation *ex contractu or ex quasi contractu* not to commit waste, the Court will entertain an action to recover damages in respect of such waste if committed.
>
> The English Courts have jurisdiction to order an account of rents and profits between tenants in common of a foreign immoveable."

Again at page 224, with reference to mortgages and immoveables, it is stated in paragraph 274.

> " Where a mortgage, whether legal or equitable, of foreign immoveables has been validly made according to English Law, an English Court will compel the mortgagor to pay off the mortgage debt out of the proceeds of sale of the land, although the mortgage does not comply with the *lex loci rei sitoe* or a mortgage of the particular kind in question is unknown to the local law.
>
> But a mortgage will not be enforced against an assignee of the immoveable, even where he takes with notice of the incumbrance, unless he is bound either by express obligation or by the local law itself to satisfy the claims of the incumbrancer.
>
> The Courts have jurisdiction to decree foreclosure of an English mortgage on foreign land, this being trated as an extinction of the right to redeem, and may make the usual decree in a redemption action in respect of foreign immoveables, and where a redemption decree has been made in this country an injunction will be granted against a mortgagee who brings a foreclosure action in the local Court and *vice versa.*"

Again, at page 227 (Paragraph 277) this is what is stated :

> " The English Courts have jurisdiction to order an account of the rents and profits of a foreign immoveable against any person liable to account in respect thereof, and in a suitable case a receiver will be appointed."

In Halsbury's at page 225 (Paragraph 275) the author says :

> "The English Courts have jurisdiction to order the specific performance of any contract relating to foreign immoveables which the *lex loc rei sitoe* allows to be carried into effect."

The general principles relating to exercise of jurisdiction in respect of foreign immoveables is stated by Halsbury in paragraph 270 thus :

> " The English Courts have power to exercise a jurisdiction *in personam*, in respect of foreign immoveables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i.e.*, there must be either a fiduciary re-

> lationship or privity of some other kind between the parties. For the Courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who have acquired a good title by the local law, nor (in the absence of privity between the parties) to impose on a foreign immoveable a burden other than the local law requires it to bear ".

From the principle so laid down, the basis for the exercise of jurisdiction in respect of foreign immoveables, will be that if the action is *in personam*, though it may relate to immoveable properties situated in a foreign territory, such rights can be declared and enforced by Courts, though they may relate to foreign immovables, the action or relief granted being based on a contract or trust where the obedience of the decree will depend upon the compliance of it by the person and not of the property. The passages relied on by the learned counsel makes this position clear, that all the actions which have been held to be maintainable in respect of foreign immovables are on something which the owner of the immovables, though they may be situated in a foreign country, is under a personal obligation to comply as and by way of directing him to collect the rents and profits of foreign immovables and pay them into the Court which passed the decree; but there can be no decree creating a right or interest in immovable properties situated in a foreign State as by creating a charge or by passing a decree in a mortgage the effect of it would be to proceed against the immovables and sell them in execution as has been done in the present case. Jurisdiction therefore in respect of foreign immovables does not extend so as to enable Courts to declare a charge over immovable property situated in a foreign State since the effect of it would be that by enforcement of such decree the immovable properties would be required to be sold. No Court, therefore, has jurisdiction in respect of foreign immovables to grant either a decree charging the properties or recognising a mortgage and passing a decree on the mortgage. In the Judgment in Appeal No. 745 of 1954, Mack, J. and myself have dealt elaborately with the question as to the rights of a Court in respect of foreign immovables. The view therefore taken by the lower appellate Court that such a decree is not legal and could not, therefore, be enforced and any sale in pursuance of the decree cannot confer any right or title on the plaintiff in respect of the suit properties is correct.

It is also urged relying on the decision in *Sundaram Pillai* v. *Kandaswami Pillai*[1], that though the property in respect of which a charge is purported to have been created by the Travancore Court has been subsequently dealt by members of the family by way of gift and sale, such a transaction did not affect the charge created under the decree as it is affected by *lis pendens*, especially in view of Exhibit B-1 which is a gift of the property in pursuance of which defendants 1 to 3 claim the properties under a later assignment Exhibit B-3 of 1941. The gift deed, Exhibit B-1, therefore is urged to be affected by *lis pendens* but as observed by the learned District Judge, section 52 of the Transfer of Property Act expressly limits the operation of the doctrine of *lis pendens*, to suits in respect of immovable properties situated within British India and not in territories outside British India. The principle of *lis pendens* is not applicable to the facts of the present case.

On all these grounds I should consider that the learned District Judge has come to the correct conclusion.

The Second Appeal fails and is dismissed with costs of respondents 1 to 3.

No leave.

R.M. *Appeal dismissed.*

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[1] (1941) 1 M.L.J. 141.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Swaminatha Udayar .. *Appellant**

v.

Mottaya Padayachi *alias* Sangili Padayachi (died) and others .. *Respondents.*

Registration Act (*XVI of* 1908), *Sections* 17 *and* 49—*Scope and effect*—*Unregistered sale-deed by mortgagor in discharge of usufructuary mortgage of property of the value of less than one hundred rupees*—*Admissibility in evidence*—*Delivery of possession*—*Effect*—*Transfer of Property Act* (*IV of* 1882), *section* 54 (3)—*Applicability.*

On a question as to the admissibility in evidence of an unregistered sale deed of immoveable property valued at Rs. 50 by the mortgagor to his usufructuary mortgagee, in discharge of the mortgage:

Held, Section 17 of the Registration Act does not require a document of sale of immoveable property of the value of less than one hundred rupees to be registered and section 49 of the Registration Act will not apply. Under section 54 (3) of the Transfer of Property Act delivery of possession would convey title. Such an unregistered document is admissible in evidence.

Kathari Narasimha Raju v. *Bhupati Raju*, (1915) 29 M.L.J. 721, referred.

Where property usufructuarily mortgaged is sold by the mortgagor to the mortgagee in discharge of the mortgage, a direction by the vendor to the vendee to keep the property as the absolute owner amounts to delivery of possession. In any event, the possession of such vendee from the date of the sale becomes adverse to the vendor.

Sheik Dawood Saheb v. *Mohideen Batcha Saheb*, (1924) 48 M.L.J. 264, applied.

Appeal against the order of the Court of the Subordinate Judge of Tiruchirapalli, dated 25th September, 1952, and made in A. S. No. 315 of 1951, preferred against the Decree of the Court of the District Munsif of Turaiyur, in O.S. No. 297 of 1949.

S. Ramachandra Ayyar, for Appellant.

K. G. Srinivasa Ayyar, for Respondents.

The Court delivered the following

JUDGMENT—The relevant facts in this miscellaneous appeal against an order of remand lie within a narrow compass. One Subramania was the original owner of the property in dispute for the recovery of which the suit out of which this appeal arises has been filed. He had usufructuarily mortgaged the property to one Marudamuthu Padayachi on 4th December, 1893, for Rs. 40. The plaintiff claims title from the heirs of Subramania, he having purchased the suit property from them by a registered sale-deed, dated 25th February, 1948. These heirs claimed that the usufructuary mortgage had become extinguished by reason of the provisions of Madras Act (IV of 1938) and that consequently they were entitled to recover possession of the property and they transferred their title in the property to the plaintiff. On the other hand the case of the contesting defendants who claim under the usufructuary mortgagee Marudamuthu was twofold. First they pleaded that the property sold to the plaintiff under the deed of sale, dated 25th February, 1948, was not the property mortgaged to them and of which they were in possession, secondly they contended that Subramania had by an unregistered deed, dated 18th August, 1900, sold the property to Marudamuthu, the consideration being discharge of the usufructuary mortgage, *viz.*, Rs. 40 and an extra sum of Rs. 10 paid at the time of the sale. On this ground they pleaded that the title of Subramania got extinguished both by reason of the sale as well as by Marudamuthu and those claiming under him having adversely enjoyed the property from 1900 the date of the sale upto the date of the suit.

The learned District Munsif who tried the suit held that the property purchased by the plaintiff under the deed of 1948 under which he claimed, did not comprise the property mortgaged which was set out in the schedule to the plaint. He also held that the unregistered deed, dated 18th August; 1900, was inadmissible in evidence under sections 17 and 49 of the Indian Registration Act and refused to admit the document in evidence for proving either the sale, or the discharge of the mortgage or the change in the character of Marudamuthu's possession by reason of that transaction. He accordingly dismissed the suit.

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*A.A.O. No. 190 of 1953. 3rd July, 1956.

The plaintiff took the matter in appeal and this came on for hearing before the learned Subordinate Judge of Tiruchirapalli. The appellate Judge held that the property purchased by the plaintiff was identical with that which was covered by the usufructuary mortgage by Subramania. He, however, held that the unregistered deed of sale of 1900 was admissible in evidence to prove the dicharge of the mortgage on the particular date. The learned Subordinate Judge went on to add :

> " . . . . After that date (the date of the sale) if the defendants prove that they have been in possession they will perfect their title by adverse possession. They get title to the property not under this document nor on the date of the discharge of the mortgage. Even assuming that they get title to the property by reason of adverse enjoyment for 12 years they get title only 12 years after the date of this discharge. . . . . . I, therefore, hold that this document is admissible in evidence for the purpose mentioned above."

Having admitted this document he remanded the suit to the lower Court for a fresh trial, and it is this order whose correctness is challenged in this appeal.

In the view which I take of the principle of law applicable to this case, I do not consider it necessary to express any opinion on the reasoning of the learned Subordinate Judge which has been attacked by Mr. Ramachandra Ayyar, learned counsel for the appellant. In the present case, as would be seen from the above narration, the value of the property involved in the sale transaction is less than Rs. 100. The relevant portion of section 17 of the Indian Registration Act enacts :

> "*Section* 17 (1) :—The following documents shall be registered.
>
> * * * * *"
>
> (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ".

No doubt the sale-deed which has been admitted in evidence is a non-testamentary instrument which purports to create a right, title or interest in immoveable property. But as the value involved is less than Rs. 100 being only Rs. 50, the provisions of section 17 are not attracted to it and it is not compulsorily registrable. Consequently section 49, which enacts that no document required by section 17 to be registered shall affect any immoveable property comprised therein or be received in evidence of any transaction affecting such property, unless it is registered does not also apply. Section 49, however, contains a provision that if a document is required to be registered by any provision of the Transfer of Property Act, the failure to get that document registered imposes the same inhibitions as a document required by section 17 of the Registration Act.

Turning to the Transfer of Property Act the relevant provision is to be found in paragraph (3) of section 54 which reads :

> " In the case of a tangible immoveable property of a value of less than Rs. 100 such transfer may be made either by a registered instrument or by delivery of the property."

The existence of an unregistered instrument does not prevent property from passing provided delivery of the property has taken place. In such a case the deed would be evidence of the contract of sale of negotiations concerning the transaction. If authority were needed I would only refer to the decision of a Bench of this Court reported in *Kathari Narasimha Raju* v. *Bhupati Raju*[1], from which it is sufficient to extract the head-note in the MADRAS LAW JOURNAL report reading :

> " The existence of an unregistered sale-deed does not prevent title passing where property sold is less than 100 rupees in value and there has been delivery of possession. The unregistered sale-deed may be used for proving the prior agreement to sell."

The next question that has to be considered is whether the fact that Marudamuthu was in possession of the property as a usufructuary mortgagee prior to the date of the sale prevents there being a delivery of possession in pursuance of the sale-deed. In regard to this matter, there is some conflict of authority. But there being a direct decision of a Bench of this Court, I am relieved from the necessity of canvassing the rulings of other Courts. The decision I am referring to is that in *Sheik Dawood Saheb* v. *Moideen Batcha Saheb*[2], and the head-note of the report runs :

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[1] (1915) 29 M.L.J. 721.

[2] (1924) 48 M.L.J. 264.

"Where property which is the subject of a usufructuary mortgage is sold to the mortgagee in discharge of the mortgage a direction by the vendor to the vendee to keep the property as absolute owner amounts to delivery of possession. Even if there is no delivery of possession in such a case, the possession of the vendee from the date of the sale becomes adverse to the vendor."

In my judgment, therefore, the unregistered sale deed, which was admitted in evidence by the learned Subordinate Judge in appeal, was correctly admitted, and the order of remand passsed by him in consequence is proper and ought to be affirmed.

The appeal fails and is dismissed with costs. There are no merits in the memorandam of cross-objection which is also dismissed. No costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU AND MR. JUSTICE RAMASWAMI.

K. K. Swami *alias* Kandaswami and another .. *Appellants**.

Criminal Procedure Code (*V of* 1898), *section* 271 (2)—*Scope—Procedure—Joint trial of two accused—One pleading guilty and the other not guilty—Proper course—Court accepting plea but continuing trial of both with jury—Statement of accused pleading guilty under section* 342 *and plea taken into consideration as against other—Effect on trial—Section* 537—*Scope of—Duty of State Prosecutor.*

Where an accused person pleads guilty, he is not on trial and cannot be tried.

Where in a prosecution on a charge against two accused persons, one of them pleads guilty, the Court must proceed under section 271 (2), Criminal Procedure Code, and dispose of the case against him, remove him from the dock and then empanel a jury, in a case triable by jury, and proceed to try the case against the other accused and keep away from the members of the jury all knowledge of the plea of guilty by the other accused, so that the jury can dispassionately consider only the evidence against the accused taking the trial, untrammelled by the plea of guilty.

Where this procedure is not followed and the case proceeds as if the accused pleading guilty is also on trial and he too is examined under section 342, Criminal Procedure Code and his statements are taken into consideration as against the other accused, it amounts to a disregard of the express provisions of law contained in section 271 (2), resulting in prejudice to the accused pleading not guilty and the trial is vitiated. It is not a mere irregularity such as would be remedied by section 537, Criminal Procedure Code. The convictions and sentences in such a case cannot be allowed to stand and must be set aside and a re-trial ordered.

Courts and Judges could not be expected to be fully conversant with the intricacies of criminal procedure and have a right to expect assistance from counsel. In a State prosecution, such assistance must come from the State Prosecutor in charge and it is for him to bring to the notice of the Court the proper procedure to be followed.

Subramania v. *Emperor*, (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 (P.C.). followed.

Md. Yusuf v. *Emperor*, A.I.R. 1931 Cal. 341 and *Emperor* v. *Kasamalli*, A.I.R. 1942 Bom. 71 relied on.

Appeals against the Order of the High Court, dated 5th December, 1955 and made in the exercise of its Ordinary Original Criminal Jurisdiction in Case No. 2 of the 4th Criminal Sessions for 1955.

C. K. Venkatanarasimhan, for Appellant.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court delivered the following judgments:

Krishnaswami Nayudu, J.—These appeals are against the conviction and sentence of the two appellants at the Fourth Criminal Sessions, 1955, the 2nd accused being the appellant in Crl. Appeal No. 74 of 1956 and the 1st accused being the appellant in Crl. Appeal No. 95 of 1956. Leave to appeal was granted under section 411-A (1) (*a*) and (*b*) of the Criminal Procedure Code by this Court.

The first accused Raghavan was charged under sections 419 and 467, Indian Penal Code for having cheated one Pushparaj, a postman attached to the Saidapet post office, by pretending to be one Krishnan and including the said Pushparaj to deliver to him Rs. 25 covered by Telegraph Money Order No. 2637 dated 28th December, 1954, intended for the said Krishnan and in the course of the same transaction for having forged the receipt and acknowledgment in the said Telegraph Money Order. The second accused K. K. Swami was charged with having abetted the commission of the said offence and therefore committed offences punishable under sections 419 and 467 read with 114, Indian Penal Code. The 1st accused pleaded guilty. The 2nd accused entered a plea of 'not guilty'. A jury was empanelled and the trial was proceeded with. The second accused was defended by counsel. The 1st accused was not defended and did not cross-examine the witnesses and did not otherwise take part in the trial. After the close of the evidence, his statement was recorded under section 342, Criminal Procedure Code, and he was questioned by Court as to whether he heard the evidence of the postman Pushparaj that he came with the money order to Krishnan and that the 1st accused impersonated as Krishnan and received the money order, to which his answer was he had nothing to say about it. A further question was put to him that he stated in the lower Court that he received the money order, and his answer was that it was true that he signed as Krishnan. When he was further asked whether he wished to say anything more, he said he had nothing further to say and that he had no defence witnesses to examine. The jury put him a question as to whether he could say the denomination of the money which he received was Rs. 5, Rs. 2 or Re. 1 and his answer was he did not remember.

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* Cr. Appeals Nos. 74 and 95 of 1956. 21st August, 1956.

In the charge to the Jury the learned Judge stated that there were two accused in this case and after referring to the charges proceeded to state as follows:

> "The first accused is not defended, ladies and gentlemen, because he had pleaded guilty to the charge. You have seen that he has admitted having impersonated as Krishnan and admitted having signed as Krishnan and so he has pleaded guilty to the charges. So far as he is concerned, you will have to return a verdict of guilty on both the charges. There is no other alternative. I only gave him a chance for him to say what he had to say when the charges were read over to him and he has admitted the offences. So in the face of the plea of guilty and the other evidence on the case you have to return a verdict of guilty against the first accused on both the charges".

The learned Judge then proceeded to discuss the evidence stating that the real dispute in the case is with regard to the 2nd accused. In the concluding portion of the charge, after discussing the evidence as against the 2nd accused, the learned Judge stated:

> "That is the offence so far as the second accused is concerned. There is one important circumstance which you must remember in considering the evidence, and that is, the first accused has pleaded guilty to the charges framed against him. He has also made a statement. 'I have received money and I have received money at the instance of the second accused'. The law says that the statement of one accused about the other accused should not be taken as evidence but you can take that into consideration. Now you are in doubt whether you should believe the evidence of Pushparaj, Jayapal Singh and Lakshmi Bai and you do not know which is true and which is not true, i.e., whether the prosecution story is true or the defence story is true. In these circumstances, when you have got a doubt whether to accept the evidence or not, the law says, if one accused makes a statement implicating himself and the other accused then you can take that into consideration. It is only to this extent you can make use of the statement made by the accused. That is only if you are in doubt about the credibility of these witnesses you are entitled to take the first accused's statement and that is only to that extent....If you believe the evidence of the prosecution, particularly the evidence of Pushparaj, Jayapal Singh and Lakshmi Bai, then the case against the second accused has been proved. So far as the first accused is concerned, he has pleaded guilty to the charges framed against him and you have to return a verdict of guilty".

Objection is taken to the mode of the trial, the contention being that the 1st accused having pleaded guilty, under section 271, Criminal Procedure Code, he should have either been convicted, or if the Court was not prepared to accept the plea of guilty, a plea of 'not guilty' should have been entered and the trial should have proceeded against both the accused with the Jury and that there is nothing in the records to show that the Court did not accept the plea of guilty and that the course of the trial does not indicate that the Court did not accept the plea of guilty and entered a plea of not guilty and tried the first accused also. Before considering the objection, it is necessary to examine the contentions whether in fact the Court did not accept the plea of guilty or proceeded with the trial treating the first accused as not having pleaded guilty. Excepting that the Court recorded a statement from him under section 342, Criminal Procedure Code, at the close of the trial, there is nothing in the record to show that the Court treated him in the same manner as the second accused, who pleaded not guilty after not accepting the plea of guilty made by the first accused and entering for him a plea of not guilty'. This is also evident from the charge to the Jury, as from the portions already extracted from the charge, it is seen that the Jury was finally asked to return a verdict of guilty so far as the first accused is concerned as he has pleaded guilty to the charges. Though, in the earlier portion of the charge, the Jury was asked to return a verdict of guilty against the first accused on both the charges in the face of the plea of guilty and the other evidence, in the concluding portion of the charge there is no mention of the other evidence and the Jury was asked to return the verdict of guilty on his plea of guilty. A reading of the charge to the Jury supports the view put forward by the appellants' counsel that the Court throughout treated the first accused as one having pleaded guilty and not otherwise.

Section 271 (2), Criminal Procedure Code, provides that if the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon. Section 272 provides:

> "If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall, in a case triable by Jury, proceed to choose jurors as hereinafter directed and to try the case, but in any other case, the Judge shall proceed to try the case himself."

In the present case, the first accused having pleaded guilty there being nothing to show that the Court at the time he pleaded guilty did not accept the plea but wanted him to be tried also and for that entered a plea of not guilty—the Court should have proceeded under section 271 (2), Criminal Procedure Code and convicted him and thereafter proceeded with the trial of the second accused alone and the Jury must therefore have been empanelled for the trial of the second accused alone.

In *Md. Yusuf* v. *Emperor*,[1] a Bench of the Calcutta High Court held that the Court has got discretion when the accused pleads "guilty" to accept the plea or not, that if the plea be not accepted there seems to be no sense in recording it, that the trial, however, cannot proceed because section 272 does not apply where accused pleads guilty and that section 271 means that where the accused pleads guilty, the Court need not necessarily record a conviction against him, his plea shall be recorded and in a suitable case the Court may leave the matter there and discharge him and he cannot then be tried. The learned Judges referred to the procedure in England as found in 2, Hale's Pleas of the Crown 225, *viz.*, where the Court does not think it expedient in the interest of the accused to convict him upon his own confession, for example, where the charge is one of murder, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty, but where he refuses to do this he cannot be tried. The learned Judges observed that the practice sometimes adopted in India where there is a joint trial of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused under section 30, Evidence Act, was illegal and an abuse of the process of the Court, and they proceeded to observe:

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[1] A.I.R. 1931 Cal. 341.

> "After a plea of guilty there is nothing in issue to to be tried between the Crown and the prisoner at the Bar. *A fortiori* after his plea of guilty has been accepted (*Khudiram Bose* v. *Emperor Per* Brett, J.,[1] and the reason is stronger still if he has been convicted upon his own confessions that is to say upon his plea of guilty. When a person has pleaded guilty he ceases *ipso facto* to be an accused person. There would be no sense in continuing to accuse him of or charge him with committing an offence after he had pleaded guilty to having done it ; still more certain is it that he ceases to be an accused person when he has been convicted. The very terms of section 342 show that it cannot be applied to a convicted person."

The learned Judges followed the view in *Subramania* v. *Emperor*[2] in which it was decided that where an accused person pleads guilty he is not on trial and cannot be tried.

It is not necessary in the present case to examine the larger question whether on an accused pleading guilty, the Court had no other option, but either to accept the plea of guilty and convict him, or if it does not accept to necessarily discharge him, or according to the English practice advise the accused to plead not guilty and proceed with the trial. If the accused in spite of the advice insists on pleading guilty, the question arises whether it would be open to the Court to enter a plea of not guilty for him and continue the trial. In the case of offences involving capital punishment, the usual practice has been not to accept the plea of guilty and to proceed with the trial entering up a plea of not guilty for the accused. That question however does not arise in the present case, as we are satisfied that the Court in the present case does not appear to have not accepted the plea of guilty made by the first accused and treated him as an accused, who has pleaded not guilty. In Chitaley's Commentaries on the Code of Criminal Procedure, 5th edition, the learned author in his notes to section 271 after referring to certain decided cases observes:

> " Where one of the accused pleads guilty and the Court accepts it it should not defer his conviction in order that his confession may be considered against his co-accused. Such a procedure is clearly against the spirit of the law. The accused shall be convicted at once and should be removed from the dock in which case he can give evidence against his co-accused. It is always desirable to pass a sentence completely before calling one accused who pleads guilty in a joint trial to give evidence against a co-accused so that the witness may give his evidence free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of other prisoner might otherwise produce."

As regards the value of such evidence, being in the nature of a confession of a co-accused, it must be scrutinized with great care and the question would then arise whether there should not be sufficient corroboration for such evidence, which need not be considered at any length in the present case. Suffice it to say that the presence of the first accused who has pleaded guilty and his statement recorded under section 342 might reasonably have influenced the Jury in assessing the evidence as against the second accused and to his prejudice.

It was held by the Privy Council in *Subramania* v. *Emperor*[2], that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as would be remedied by section 537 of the Criminal Procedure Code. The express provision of section 271 (2) of the Code regarding the trial must be held in this case to have been disregarded since inasmuch as after the plea of guilty of the first accused, the Court should, have proceeded under section 271 (2) and disposed of the case as against the first accused, removed him from the dock and then empanelled the Jury and proceeded to try the case against the second accused. We are satisfied that the trial of the second accused has been vitiated by this departure from the procedure prescribed by the Code.

The learned Public Prosecutor, however, contended that the fact that the Court recorded a statement under section 342, Criminal Procedure Code, from the first accused implied that the Court did not accept the plea of guilty made by the first accused and that it is also seen from the charge to the Jury that the Court called upon the Jury to return a verdict of guilty not only on the plea of guilty but also on the other evidence in the case and that though it might be urged that the charge to the Jury is vitiated, there is no illegality in the procedure adopted for the trial. The learned Public Prosecutor obviously refers to that portion of the charge to the Jury where it is stated:

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[1] 9 C.L.J. 72. I.L.R. 25 Mad. 61 (P.C.).

[2] (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257:

> "In the face of the plea of guilty and the other evidence in the case you have to return a verdict of guilty against the first accused on both the charges"

but the other portions of the charge to the Jury which have been extracted show that the Jury was asked to return a verdict of guilty against the first accused on his plea of guilty alone and that the statement under section 342, Criminal Procedure Code, was recorded as the Court wanted to give a chance for him to say what he had to say when the charges were read over to him and he had admitted the offences. We are satisfied, therefore, that there is no indication anywhere to support the Public Prosecutor's plea that the Court did not accept the plea of guilty of the first accused and entered a plea of not guilty for him and proceeded with the trial as against him also. It appears to us that once the first accused has pleaded guilty, there was no need to refer to his case in the charge to the Jury and call upon the Jury to return a verdict of guilty, since it is not for the Jury to return a verdict of guilty against an accused, who has himself pleaded guilty. Under section 271 (2) it is for the Court to convict him and the Jury is empanelled only when "the accused refuses to, or does not plead or if he claims to be tried", which, however, has not arisen in the case of the first accused, once he has pleaded guilty. It is sufficient for the purpose of the objection raised to the mode of the trial to observe that the trial has not been in accordance with the requirements of the Code and this departure from the requirements of the Code has prejudiced the trial of the second accused and in the circumstances the convictions and sentences cannot be allowed to stand and the only course open to us is to set aside the convictions and sentences of both the accused and order a re-trial.

This case therefore requires to be re-tried on account of the fact that the proper procedure has not been observed. Courts or Judges could not be expected to be fully conversant with the intricacies of criminal procedure and it is in such circumstances that they have a right to expect assistance from counsel, and in a State prosecution such assistance must have come from the State Prosecutor in charge. It was for him to have brought it to the notice of the Court that as soon as the first accused pleaded guilty, the procedure prescribed in section 271 (2), Criminal Procedure Code, should have been adopted. The failure to have done so has necessitated a re-trial involving delay, loss and inconvenience to everyone concerned. As observed by Beaumont, C.J., in the Full Bench case in *Emperor* v. *Kasamalli*[1]:

> "Judges have a right to expect assistance from counsel, and more particularly from counsel instructed on behalf of the Crown."

The prosecution ought to have pointed out in the Court that the procedure laid down in section 271, Criminal Procedure Code, had not been followed and the same rectified then and there.

The result is, the appeals are allowed, the convictions and sentences are set aside and a re-trial is ordered.

Since a re-trial is now ordered, accused 2 who is on bail will continue to be on bail on the same bond until the disposal of the case.

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[1] A.I.R. 1942 Bom. 71 (F.B.).

Ramaswami, J.—I agree with the re-trial ordered by my learned brother. We have no option but to direct the re-trial, because on account of the very unusual procedure adopted in this case, there has been substantial deviation from the mode of trial prescribed by the Code of Criminal Procedure, resulting in very serious prejudice to the appellants and constituting an incurable irregularity.

The plea entered by the Clerk of the State and the minutes-book maintained by him and the reference in the charge to the Jury, to which my learned brother has alluded, do not show that the plea of guilty by accused 1 was not accepted by the Court. If the plea of guilty has been accepted this accused 1 had ceased *ipso facto* to be an accused person and the other accused, *viz.*, accused 2, could not be tried along with him and this accused 1 could not have been questioned under section 342, Cr. Procedure Code and the members of the Jury told as was the case here that that statement could be taken into consideration against accused 2. In fact how could the Jury avoid convicting accused 2 when he stood his trial with accused 1 who had pleaded guilty and who had re-affirmed it in the answers given by him to questions put to him under section 342, Criminal Procedure Code and the learned Judge himself has directed the members of the Jury that they had no option but to convict accused 1 on his own plea of guilty. If on the other hand the learned Judge had not accepted the plea of guilty of accused 1 and then proceeded with the trial, the learned Judge would not be justified in directing the Jury, as he has done, to convict accused 1 by reverting to the plea of guilty without referring to the evidence and which gave no chance to the members of the Jury at all to consider the evidence for and against the appellants, the plea of guilty by accused 1 being treated as if it were a confession of the co-accused in the dock.

The correct procedure which is followed invariably in the Courts of Sessions, of which I have more than a quarter of a century experience, is that as soon as one of the accused pleads guilty and if the plea is accepted by the Court, to remove him from the dock and then empanel the Jury only for the trial of the accused who had pleaded not guilty but claimed to be tried and keep away from the members of the Jury all knowledge of the plea of guilty by the other accused, so that the Jury can dispassionately consider only the evidence against the accused taking the trial, untrammelled by the plea of guilty. On the other hand, if the admission of the commission of the offence by that accused is not accepted, a note is made that notwithstanding the admission, a plea of not guilty is being entered and that the trial is being proceeded with. In that case, that accused participates in the trial just like the other accused taking their trial and in the charge to the Jury, the members of the Jury are directed to consider the evidence for and against each of the accused before them on its own merits, taking into consideration but not treating as substantive evidence the explanations given under section 342, Criminal Procedure Code.

In the result, I agree with the order of re-trial proposed by my learned brother.

P.R.N. *Convictions and sentences set aside.*
Retrial ordered.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Abdul Salam .. *Petitioner**.

Madras Prevention of Adulteration Act (III of 1918) *and Madras Prevention of Adulteration Rules, Rule* 37 (*E*) *and Prevention of Food Adulteration Act* (*XXXVII of* 1954), *section* 2 (*j*) *and section* 25—*Rules under—Rule* 29—*Effect of.*

Admixture of any coal-tar derivative to tea-dust would certainly constitute an infringement of the provisions of the former Madras Act (III of 1918) and rule 37 (*e*) of the Rules framed under that Act. But under the present Central Act which replaces the Madras Act, only the admixture of any coal-tar dyes, except those specified in rule 29 of the rules, would constitute an adulteration. But section 25 (2) of the new Act expressly saves the existing law till they are modified and unless they are repugnant to the provisions of the new Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Tirupathur, dated 21st May, 1956 and passed in C.C. No. 71 of 1956.

N. C. Raghavachari, for Petitioner.

V. V. Radhakrishnan, for the Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—This criminal revision is directed against the conviction and sentence of the learned Sub-Divisional Magistrate of Tirupathur in C.C. No. 71 of 1956.

The facts are : The Sanitary Inspector of Vaniyambadi purchased from the shop of this accused a packet of tea-dust and which on being sent to the Public Analyst was found to contain artificial colouring matter derived from coal-tar, and which the Public Analyst considered constituted an infraction of Rule 37 (*E*) of the Madras Prevention of Adulteration Rules, which prohibited the sale or possession for the purpose of sale a mixture of tea and any substance prepared in imitation or as a substitute for tea. The position taken by the accused was that he did not sell the tea to the Sanitary Inspector, that the tea was taken from his shop and that he did not know that any substance was added to the tea and that he had not committed any offence. The learned Magistrate convicted the accused as charged and sentenced him to pay a fine of Rs. 10.

Two points are taken before me by the learned advocate, Mr. Raghavachari· First of all, he contends that this addition of coal-tar derivative to the tea-dust did not constitute a mixture of tea with any substance prepared in imitation or as a substitute for tea. I am unable to agree with this contention of the accused. What is sought to be hit at under this old Rule 37 (E) (*b*) was that there should be no adulteration of the pure tea offered for sale by the admixture of colouring substance derived from coal-tar. Under section 5 (1) (*a*) of Act III of 1918, adulteration is selling any food which is not of the nature, substance or quality of the article demanded by the purchaser. There can be no dispute, therefore, that the admixture of this coal-tar derivative constituted an adulteration which is within the purview of Rule 37 (E) (*b*) of the old Rules.

Therefore, the next argument of the learned advocate is that under section 2 (*j*) of Act XXXVII of 1954 an article of food shall be deemed to be adulterated only if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article. In accordance with this provision Rules have been framed and Rule 28 of the Prevention of Food Adulteration Rules, 1955, states :

> " No coal-tar dyes except the following shall be used in foods :
>
> (*a*) Indigetine (F.D.C. Blue No. 2).
>
> (*b*) Organe I (F.D.C. Orange No. 1).
>
> (*c*) Amaranth (F.D.C. Red No. 2).

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*Crl. Rev. Case No. 857 of 1956. 25th October, 1956.
(Crl. Rev. Pet. No. 795 of 1956).

(*d*) Erythresine (F.D.C. Red No. 3).

(*e*) Tartrazine (F.D.C. Yellow No. 5) ".

Therefore, the learned advocate contends that as it is not known whether this coal-tar derivative present comes within these five categories, no offence could be said to have been committed by this accused. This argument would be valid but for the saving clause in section 25 (2) of Act XXXVII of 1954 which lays down :

> " Notwithstanding the repeal by this Act of any corresponding law, all rules, regulations and bye-laws relating to the prevention of adulteration of food, made under such corresponding law and in force immediately before the commencement of this Act shall, except where and so far as they are inconsistent with or repugnant to the provisions of this Act, continue in force until altered, amended or repealed by rules made under this Act."

On the date on which this seizure was made and the prosecution was launched and the conviction was recorded, this new Rule giving a category of five coal-tar derivatives which could be used, had not come into operation. Therefore, the old Rule 37 (E) cannot be considered to be repugnant to the rule framed under Act XXXVII of 1954. Consequently, it cannot be said that by reason of the coal-tar derivative used in this case falling within one or more of the five categories contained in the new Rule, the accused would be saved.

But in view of the fact that the learned advocate mentions that a number of cases of this nature are pending, the Public Analyst should, in future, frame his report in the light of the Rules framed under the new Act showing whether the coal-tar derivate comes within the five categories or not. The certificates of the Public Analyst cannot afford to be in future of the same vague description as before because they have to be in conformity with the Rules framed under the new Act and which have been published by the Central Government.

In the result, I confirm the conviction but set aside the sentence of fine because when these Rules have come into force and tradesmen are ignorant of what is prohibited and what is not prohibited, it would be enough if he is admonished through his advocate to be careful in future and purchase copies of the new Rules and see that he does not violate any of the Rules giving room for prosecutions of this nature. The fine amount, if collected, will be refunded.

R.M. *Conviction confirmed but sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR

C. D. Venkataraman, District Magistrate (Judicial), Tiruchirappalli .. *Petitioner**.

Constitution of India (1950), *Article* 226—*Scope of proceedings under—Existence of alternative remedy—When to be considered.*

The existence of an alternative remedy does not bar the jurisdiction of the High Court under Article 226 of the Constitution and it is merely a matter to be taken into account in exercise of its discretion to issue the writ or not. At the preliminary stage the Court would consider not the mere existence of the remedy, but its reality, adequacy and its effectiveness.

Quaere.—Whether a rule requiring the prior permission of the head of a department before a Government servant could resort to proceedings under Article 226 of the Constitution is valid ?

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the records in G.O. Ms. 1463, Home Department, dated 16th May, 1956 and issue a writ of *certiorari* or any other appropriate writ, direction or order and quash the G.O. Ms. No. 1463, Home Department, dated 16th May, 1956, in so far as it affects and brings about a reduction in the petitioner's rank and seniority in the list of Madras State Judicial Service.

The Office placed the matter before the Court for orders with the following note :—

S.R. Nos. 31160 and 31162 (W.P. and Petition for suspension of operation of order).

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*S.R. No. 31160 of 1956 in Writ Petition No. 1131 of 1956. 20th September, 1956.

S.R. No. 31160 is a petition filed under Article 226 of the Constitution by Sri C. D. Venkataraman, District Magistrate (Judicial), Tiruchirapalli, for the issue of *certiorari* or other appropriate writ to call for the records and quash the order of the Government relating to the fixation of the petitioner's rank and seniority in the Madras State Judicial Service. S.R. No. 31162 is filed for suspension of the operation of the said order pending disposal of the writ petition. The point for consideration is whether the petitions are maintainable.

Under clause 3 of the impugned Government Order (Exhibit E filed with the writ petition) the Registrar of the Court has been requested to refix the seniority of the petitioner (along with other officers) in accordance with the orders in the preceding paragraphs. The petitioner has got a remedy by way of Appeal to the Governor of Madras under Rule 21 of the Madras Civil Service (Classification, Control and Appeal) Rules. Objection was, therefore, raised by the Office as to whether the writ petition can lie when the petitioner has not exhausted that remedy. It was also asked whether permission of the higher authorities had been obtained for filing the petition the petitioner being still in service. The petitioner's advocate has stated in his endorsement thereon that the averments in paragraphs 27 and 28 of the petitioner's affidavit (that such a remedy is illusory) answer the point raised, that the existence of an alternative remedy is not a bar in the present case and that no permission is necessary.

It is submitted that the question whether the existence of an alternative remedy is a bar to the filing of a writ petition appears to depend on the particular facts of each case, though it is a very relevant factor to be taken into consideration by the Court in deciding whether the jurisdiction undoubtedly vested in the Court under Article 226 of the Constitution will be exercised in a given case. (Vide *Subramania Chettiar* v. *Revenue Divisional Officer, Devakottai*[1] and *Krishna Iyer* v. *State of Madras*[2]. Even if it is conceded that a writ petition would lie in this case it is not clear how the petitioner who is still in service under the Madras Government can file a petition against the Government without obtaining the leave of the higher authorities. As the matter is not free from doubt, the petitions are submitted for orders of Court regarding maintainability.

Cases of this kind where questions of maintainability arise are of frequent occurrence and the practice was to post such cases for orders without being numbered. But in a few instances, such cases were directed by Court to be numbered and posted for orders and a practice has, therefore, recently sprung up to number the cases subject to maintainability. As the practice has not been uniform, orders of Court are also solicited whether such cases should in future be numbered subject to maintainability and posted before Court for admission or whether they should be posted for orders of Court regarding maintainability in the S.R. stage itself.

K. V. Venkatasubramania Ayyar and *G. R. Jagadisan*, for Petitioner.

The Court made the following

ORDER.—The existence of an alternative remedy does not bar the jurisdiction of this Court under Article 226 but is merely a matter to be taken into account in exercising its discretion to issue the writ or not. At that stage the Court would consider not the mere existence of the remedy but its reality, adequacy, and effectiveness. Therefore the proper course for the office is to draw the attention of counsel to the existence of the alternative remedy and to the possibility of the writ being dismissed on that ground, so that the petitioner might not later be mulcted with costs. Secondly, the office will also bring this fact to the notice of the Court at the time of the admission so that the Court might be apprised of this circumstance before a rule *nisi* is issued. The numbering of the writ petition, however, need not be refused on this ground.

In regard to the second objection as to whether the petitioner had obtained the permission of the head of his department before filing the petition, that is not a matter for the office at all, nor even for the Court in disposing of the writ. If the service rules prescribe that without prior permission no writ could be filed against Government—I am not aware of any in this case—the filing of the writ without permission might be a ground for taking disciplinary action against the officer, but certainly not a ground for rejecting the petition. Article 226 does not impose such a qualification and the Court cannot read any such into the article. I would only add that it is not quite clear to me whether a rule which imposed such a ban would be valid at all seeing that the Constitution by Article 226 had granted a right to every citizen—and this would include Government servants—to approach the High Courts for redress where violation of the law is made out. It is sufficient to say that a writ petition cannot be refused to be numbered on this ground.

R.M. *Order accordingly.*

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[1] (1956) 2 M.L.J. 126.

[2] (1956) 2 M.L.J. 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

Mustafa Badsha and another .. *Petitioners**

v.

Madras Motor Insurance Co., Madras .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 92 (2) (a)—Claim for damages for death caused by car accident—Insurance Company contending that policy was cancelled and surrendered before accident—If entitled to be added as party and defend the suit.

Under section 96 (2) of the Motor Vehicles Act there is a specific provision that an insurer to whom notice of proceedings (for recovering damages for death caused as a result of a car accident) is given, shall be entitled to be made a party thereto and to defend the action on any of the grounds specified in that sub-clause. Where the Insurance Company's contention is that the policy was cancelled by virtue of the provisions contained therein before the accident giving rise to the liability and that subsequently the certificate of insurance was surrendered to the insurer, the contention falls under sub-clause (*a*) of clause (2) of section 96 and the Insurance Company has got a right to come on record and defend the suit on that ground. An order restricting the Insurance Company in the matter of defending the suit namely that they shall have the right only to watch the proceedings, is erroneous.

If a party is brought on record as a defendant then naturally it follows that that party should be allowed to exercise all the rights and privileges conferred by the Civil Procedure Code. The Civil Procedure Code does not create a class of defendants who could be called spectator or dummy defendants.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Sixth Assistant City Civil Judge, Madras, dated 7th December, 1955 and made in I.A. No. 409 of 1955 in O.S. No. 1190 of 1955.

C. R. Krishna Rao and *Mahammad Abibulla,* for Petitioners.

M. Sundaram, for Respondents.

The Court delivered the following

JUDGMENT.—C. R. P. No. 428 of 1956 is filed by the plaintiffs against the order made against them in I.A. No. 409 of 1955 in O.S. No. 1190 of 1955 a suit filed by them against the defendants to recover damages for the death of their child as a result of a car accident. According to the plaintiffs, the car at the time of the accident belonged to the first defendant; but, according to the respondent Insurance Company, it belonged to the second defendant by reason of a transfer in his favour. The third defendant to the suit was the driver of the car. The application, I.A. No. 409 of 1955, was made by the Insurance Comapny to be brought on record, as the defendant and they were brought on record, but with this restriction that they would be permitted only to watch the proceedings, that is to say, as a dummy defendant. I am not convinced about the propriety of that order, because the Civil Procedure Code does not create a class of defendants who could be called spectator or dummy defendants. If a party is brought on record as a defendant, then, naturally it follows that, that party should be allowed to exercise all the rights and privileges conferred by the Civil Procedure Code. However, the revision is filed against the order bringing on record the Insurance Company, and Mr. C. R. Krishna Rao for the plaintiffs contends that they (the company) are not even proper parties to the suit, that their liability is absolute and that once the plaintiffs obtain a decree against defendants 1 and 2 then that decree is straightaway executable against the Insurance Company without their being allowed to raise any objection. But that contention, to the extent to which it is relevant for the purpose of this revision namely whether the Insurance Company is a proper party or not, does not seem to me to be sound, because, under section 96 (2) of the Motor Vehicles Act there is a specific provision that an insurer, to whom notice of any such proceedings is given, shall be entitled to be made a party thereto and to defend the action on any of the grounds specified in that sub-clause. The learned counsel for the Insurance Company contends that the contention which they put forward in the suit would fall under sub-clause

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* C.R.P. Nos. 428 of 1956 and 1367 of 1955. 21st September, 1956.

(a) of clause (2) namely, that the policy was cancelled by virtue of any provision contained therein before the accident giving rise to the liability and that subsequently the certificate of insurance was surrendered to the insurer. If that is the contention, it clearly follows that the Insurance Company has got a right to come on record and defend the suit on that ground. The further question how far that contention is sustainable in view of the other provisions in that Act does not certainly arise for consideration at this stage. The relevant consideration now is, what is the contention which the Insurance Company puts forward and whether that contention would fall within any of the several sub-clauses of clause (2) of section 96. As I stated, the contention which the Insurance Company seeks to put forward is a contention which would be covered by sub-clause (a) of clause (2) of that section.

It follows that in this case the Insurance Company was properly brought on record as a party-defendant, and so, C.R.P. No. 428 of 1956 is dismissed with costs. C.R.P. No. 1367 of 1955 is against the order restricting the Insurance Company in the matter of defending the suit, namely, that they shall have the right only to watch the proceedings. That, on the face of it, is erroneous, and so, this C.R.P. is allowed, but without costs.

K.S. ——— *C.R.P. No.* 428 *of* 1956 *dismissed.*
C.R.P. No. 1367 *of* 1955 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Parukutty Amma (died) and another .. *Appellants**

v.

Janaki Amma and others .. *Respondents.*

Malabar Law—Tarwad—Partition—Division in status—Agreement before Madras Marumakkathayam Act (XXII of 1933) entered into by all adult members representing the tavazhis to effect partition—Effect of—Provision that partition by metes and bounds should be effected within specified time—No actual division made or deed executed within specified time—If nullifies division in status—Suit after Act for partition of tarwad properties—Maintainability.

Practice—Relief—Claims for larger relief found unsustainable in appeal—Grant of lesser relief.

Under the Malabar Law, even before the enactment of the Madras Marumakkathayam Act, XXII of 1933, if all the adult members representing the tavazhis constituting a tarwad entered into an agreement to effect a division, that would operate as a division in status. The circumstances that the agreement recites that a regular partition should be effected within a specified period from the date of the agreement, but no such partition is effected within that time will not nullify the effect of a division in status, when it is not alleged and proved that time is the essence of the contract in such a matter. When there has been a severance in status as a result of the agreement, the fact that a partition dividing the properties by metes and bounds has not been effected within the period mentioned would be no ground to ignore the agreement or for regarding the tarwad as still continuing to be an undivided tarwad. Once there is a division in status, unless there is a revision among the members, there cannot be an undivided family, which would entitle a member of the divided tarwad to file a suit for partition of the tarwad properties after the coming into force of the Marumakkathayam Act.

S.A. No. 1739 of 1918, followed.

Sundara Iyer's 'Malabar Law', page 16, relied on.

Karthiyayini Kunchi Amma v. *Minakshi Amma*, (1935) 70 M.L.J. 114 : I.L.R. 59 Mad. 693, *Madhavi Amma* v. *Subramaniam Nambudripad*, (1939) 1 M.L.J. 487, *Madhavi* v. *Nagappan*, (1940) 2 M.L.J. 791 : I.L.R. (1940) Mad. 1008 and *Madhavi Amma* v. *Nagappan Nair*, (1939) 1 M.L.J. 91 : 48 L.W. 868, referred to.

Though the plaintiff cannot maintain a suit for general partition of the properties as a whole when he is entitled to partition of the properties falling to a separated tarwad or tavazhi, the appellate Court will not dismiss the suit and drive him to separate suit. Suit remanded to lower Court to determine share of property falling to members of separated branch.

Appeal against the Decree of the Court of the subordinate Judge (Additional) of South Malabar at Kozhikode, dated 26th June, 1951 and made in O.S. No. 60 of 1949.

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* Appeal No. 103 of 1952. 20th July, 1956.

K. Kuttikrishna Menon and *V. Balakrishna Eradi*, for Appellants.

N. Sundara Ayyar, V. R. Venkatakrishnan, D. A. Krishna Variar, P. V. Rama Variar, N. R. Sesha Ayyar, T. R. Ramachandran, C. F. Louis and *C. Vasudeva Mannadiar*, for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—O. S. No. 60 of 1949 in the Court of the Subordinate Judge of South Malabar at Kozhikode was a suit for partition and recovery of possession of the share of the properties which fell to one Govindan Nair set out in schedules B, C and D to the plaint with the liability mentioned in the C schedule in favour of the three plaintiffs and the fifty-seventh defendant. It was alleged that defendants 1 to 47 as well as Govindan Nair and Kunhiraman Nair formed members of Kundumadam tarwad and before his death Govindan Nair and Kunhiraman Nair had issued notices to the tarwad Karnavan as also to the managers of the respective tavazhis claiming partition of their share and consequently a severance in status had been created. Govindan Nair just before his death had executed a will bequeathing his share to the plaintiffs who are his children and the fifty-seventh defendant, his widow. That is how the plaintiffs claim their share of the properties. Govindan Nair died on 25th May, 1945. Kunhiraman Nair and defendants 32 to 38 belong to the first tavazhi and defendants one to twelve and thirty-one belong to the second tavazhi. Minor defendants thirteen to thirty are the children of some of the members among the defendants one to twelve and as such they also belong to the tavazhi of Govindan Nair, that is, to the second tavazhi. It is not quite necessary to detail the separate defences put forward by the respective defendants except to say that the chief of them was to the effect that there was no undivided tarwad which could be the subject of partition. Defendants 31 and 32 who are the appellants in this appeal state that by Exhibits B-1 and B-2 there was an outright division of the tarwad properties in 1928 and as such the plaintiffs' claim for a fresh division is unsustainable. Some of the defendants also pleaded that the Kundumadam tarwad as such does not exist now.

In the lower Court the main issues for consideration were whether the karar B-2, dated 8th June, 1928, operated as a partition or only as a maintenance arrangement and whether the agreement for partition set up by some of the defendants, *viz.*, B-1, dated 20th February, 1948, effected a division in status and if so thereafter whether an undivided tarwad as such existed. The learned Subordinate Judge considered the legal import of Exhibit B-2 after analysing its provisions and came to the conclusion following the decision in *Ammalu Amma* v. *Vasu Menon*[1], that the document amounted only to a maintenance arrangement and cannot be understood as an outright partition.

We may at the very outset state that we have very serious doubts about the correctness of the decision by a single judge in *Ammalu Amma* v. *Vasu Menon*[1]. Though the learned Judge has discussed the document in question in that case in great detail it seems to us that he has not properly appreciated the trend of authority and has not also correctly understood how such documents had been interpreted by learned Malabar lawyers. But, whatever that might be we are not called upon in this case to overrule that decision because in the view we take about Exhibit B-1 the interpretation of Exhibit B-2 would take an absolutely different turn.

Under Exhibit B-1 dated 20th February, 1928, all the adult members of the tarwad except the thirty-second defendant have entered into an agreement by which they agreed to partition the tarwad properties into 24 equal shares, out of which two shares were to be allotted to the first executant, Kunhiraman Nair and the remaining 22 shares were to be partitioned equally amongst the remaining 22 members inclusive of the minors who constituted the then members of the tarwad and that a partition deed to that effect should be executed and registered within 15 days from that date. It was further provided that if in consequence of malicious intention, any of the members did not agree to the said stipulations such of those members and also the properties falling proportionately to their shares shall be entrusted as common properties to the members of any of the tavazhis which the karnavan may choose and the karnavan and the remaining members who co-operate in this matter shall have the authority and freedom to execute a partition deed and get the same registered in the regular manner. The reason why the thirty-second defendant did not sign the agreement was that he was not in the locality at that time but he has subsequently affirmed and ratified the agreement. As appellant here and as defendant in the lower Court he has always stood by the Karar, Exhibit B-1 as effecting a division in status. D.W. 1, the husband of the thirty-first defendant, who was examined on behalf of defendants thirty-one and thirty-two, has deposed that the thirty-second defendant did not sign the Karar as he was not in the locality at that time. He further deposed that it was in pursuance of the agreement, Exhibit B-1 that Exhibit B-2 came to be executed. Therefore we may take it that all the members of the tarwad had agreed on 20th February, 1928 to have a partition of the entire properties of the tarwad into 24 equal shares. Further this Karar, Exhibit B-1, has also been engrossed on stamp paper.

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[1] A.I.R. 1944 Mad. 108.

It has to be remembered that this agreement was entered into nearly five years earlier to the enactment of the Madras Marumakkathayam Act when partition in the Marumakkathayam family was permitted only with the consent of all the adult members. Subsequent to the passing of the Act as has been laid down in *Karthiyayini Kunchi Amma* v. *Minakshi Amma*[1], the change in the law introduced by the enactment of the Madras Marumakkathayam Act XXII of 1933 has made the doctrine of severance of status applicable to tavazhis under the Marumakkathayam law as it is to persons under the Mitakshara law and for precisely the same reason. See also *Madhavi Ammal* v. *Subramaniam Nambudripad*[2], *Madhavi* v. *Nagappan*[3] and *Madhavi Amma* v. *Nagappan Nair*[4].

That being the case we have to decide whether by Exhibit B-1 there has been a severance in status between the various members. Though the document states that partition should be effected within 15 days of its coming into existence, it is the case of D.W. 1 that it was in pursuance to Exhibit B-1 that Exhibit B-2 came to be executed. Whatever that might be, no one has alleged that time is the essence of the contract in a matter like this and that being the case if by Exhibit B-1 there is a severance in status effected, then the fact that a partition dividing the properties by metes and bounds had not been effected within the period mentioned would not nullify the effect of a division in status.

The learned Subordinate Judge took the view that because within 15 days of Exhibit B-1 a partition deed was not executed by which an out and out division would take place, Exhibit B-1 could be ignored. He was also of the opinion that since the minors were not parties the document has not sufficient basic value. Though one of the learned counel appearing in the lower Court contended that if there was a division in status by Exhibit B-1 unless there was a re-union there cannot be an undivided tarwad, the learned Judge did not think it necessary to go into that question. In our view he is wrong in considering that Exhibit B-1 did not effect a severance in status. We are fortified in our conclusion by an unreported decision in S.A. No. 1739 of 1918 by Sadasiva Aiyar and Spencer, JJ. What happened in that case was that the senior members of an undivided tarwad entered into an agreement, dated 5th May, 1904, by which it was agreed to divide the assets and liabilities of the tarwad into 47 shares out of which three shares were to be allotted to the tavazhi of executant No. 1, fourtean shares to the tavazhi of executant No. 2, seventeen shares to the tavazhi of executant No. 3, nine shares to the tavazhi of executants Nos. 4 to 7, one share each to executants Nos. 8 and 9, one share to the minor who was under the guardianship of the 8th executant and another share to the elder brother of executant No. 9. Subsequently when a suit was brought by one of the members of the tavazhi of executant No. 3, claiming maintenance out of the properties of the undivided tarwad, as it stood at the time of the agreement, the contention was that a division in status was effected by this agreement and, therefore, the plaintiff could claim maintenance only from the tavazhi of which he was a member. Paragraph 8 of the agreement also stated that a schedule of debts and assets should be prepared and that a partition deed be immediately drawn up in accordance with the stipulations contained in the agreement but no partition deed was executed on that basis. Construing the document Sadasiva Aiyar and Spencer, JJ., observed as follows :—

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[1] (1935) 70 M.L.J. 114 : I.L.R. 59 Mad. 693.

[2] (1939) 1 M.L.J. 487.

[3] (1940) 2 M.L.J. 791 : I.L.R. 1940 Mad. 1008.

[4] (1939) 1 M.L.J. 91 : 48 L.W. 868.

> "The partition agreement effected division of status between the 22nd defendant's tavazhi (to which the plaintiff belongs) and the other tavazhis. The plaintiffs are, therefore, not entitled to bring a suit for maintenance against a complex undivided tarwad (of several tavazhis) which no longer exists and their claim lay only against the karnavan of their own tavazhi which has become a separate independent tarwad".

It is clear, therefore, from this decision that even before the enactment of the Madras Marumakkathayam Act, if all the adult members representing the tavazhis enter into an agrreement to effect a division, that would constitute a division in status. The observations contained in Sundara Aiyar's 'Malabar law' at page 16, also tend to the same view. We are, therefore, of the opinion that Exhibit B-1 has effected a severance in status.

The documents filed in the case show that even if Exhibit B-1 did not amount to a partition, Exhibit B-2 in any event effected a partition. Exhibit A-1, dated 14th October, 1943, is a registered notice sent by Govindan Nair to the other members of the tarwad wherein he admits the validity of the partition and states that he has separated in accordance with law giving up the joint family status. Exhibit B-6, dated 14th October, 1943, is another notice containing similar statements. Exhibits A-2, A-3 and A-4 are all notices sent by Govindan Nair. In all these documents he admits that he is a divided member. How the plaintiffs who are the legal representatives of Govindan Nair can now be heard to say that there was no division of the tarwad properties has not been explained. In Exhibit B-14 which is the written statement filed by the first plaintiff in O.S. No. 195 of 1910 on the file of the District Munsif's Court, Manjeri, there is an unequivocal admission that Exhibit B-2 has effected a partition and the will, Exhibit A-6, executed by Govindan Nair proceeds on the footing that there has been a partition and he has got his share. Such being the case, it is too late in the day for the plaintiffs to contend that an undivided tarwad exists. We have to take it, therefore, that in accordance with the division in status effected by Exhibit B-1 a partition deed came to be executed under Exhibit B-2, and whatever might be the terms of Exhibit B-2, it cannot be said that it is a maintenance arrangement. When once a division in status is effected, unless there is a re-union among the members, there cannot be an undivided family and nobody thought of suggesting that by Exhibit B-2 there has been a re-union. That being the case, reading Exhibits B-1 and B-2 together, the result comes to this : —In order to effectuate the recitals contained in Exhibit B-1, Exhibit B-2 came to be executed. If that is so, the plaintiffs cannot claim a share on the footing that an undivided tarwad exists. The appeal by defendants 31 and 32, must, therefore, be allowed.

But the plaintiffs have put forward an alternative case in paragraph 14 of the plaint that if Exhibit B-2 is to be construed as a partition deed then the tavazhi of Govindan Nair has become partitioned and separated as a separate tavazhi tarwad consisting of defendants one to thirty-two and that the plaintiffs would be entitled to get Govindan Nair's share from that tavazhi. We think that the suit should not be dismissed thereby driving the plaintiffs to another suit. That being the case, while allowing the appeal, we remand the suit to the trial Court for determining the share of Govindan Nair in accordance with the partition deed, Exhibit B-2 and for passing the final decree on that basis. The appellants are entitled to their costs in this Court from the plaintiffs-respondents. The Court-fee paid in the Appeal memo. will be returned.

P.R.N ——— *Appeal allowed : Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Chundri Sreeramalu .. *Appellant**

v.

Tadavarthi Nagarathnamma and others .. *Respondents.*

Court Fees Act (VII of 1870) as amended in Madras, Section 7 (iv) (f)—Applicability and scope—Suit for accounts—Valuation and Court-fee—Right of plaintiff to put notional valuation—Appeals against final decree by plaintiff and defendant sailing with him—Distinction between as regards Court-fee and valuation.

A plaintiff appealing from a final decree in a suit for accounts can value his appeal notionally. The language of section 7 (*iv*) (*f*) of the Court-Fees Act entitles the plaintiff to value the claim notionally both in the suit and in the memorandum of appeal, although the appeal may be against the final decree and as against the ascertained amount. He may maintain a suit valuing it at Rs. 100 only. But the appellate Court has power to direct the plaintiff-appellant to state the amount involved in each objection taken by him. An appeal preferred by a defendant in such a suit stands, however, on a different footing. His appeal cannot and will not be heard unless the defendant-appellant gives the Court an abstract of the amounts claimed by him under various heads and pays court-fee thereon, although both the plaintiff and the defendant might sail together. The language of section 7 (*iv*) (*f*) specially applies only to a plaintiff but does not extend the immunity to a defendant appealing.

Faizullah Khan v. *Mauladad Khan*, (1929) 57 M.L.J. 281 : I.L.R. 10 Lah. 737 : L.R. 56 I.A. 232 (P.C.), *Ramadoss* v. *Appalanarasayya*, (1943) 2 M.L.J. 347 and S.A. No. 1141 of 1934 : (1939) 49 L.W. 12 (Summary of Recent Cases) followed.

Appeals preferred to the High Court against the Decree of the City Civil Court, Madras, dated 30th December, 1948 in Original Suit No. 113 of 1940.

D. Suryaprakasa Rao, for Appellants in C.C.C. Appeal No. 59 of 1949.

P. Somasundaram for *U. Sethumadhava Rao*, for Respondents 1 to 3 in C.C.C. A. No. 59 of 1949 and Appellant. in C.C.C. Appeal No. 64 of 1949.

N. C. V. Ramanujachari and *M. V. Nagaramayya* for Respondents 4, 5 and 7 to 16 and *C. Vasudevan*, for 6th Respondent in C.C.C. Appeal No. 59 of 1949.

The Judgment of the Court was delivered by

Ramaswami, J.—These appeals cannot be disposed of either on the grounds of appeal or on the question of Court-fee. We have to reopen the matter and hear the parties to decide whether the Commissioner's report is correct or the Judge's decision differing from the Commissioner is correct. If the Commissioner's report is confirmed, the plaintiffs stand to gain a large amount. If the Judge's decision is confirmed the plaintiffs will have no case. This is apart from the fact that both as against the Commissioner's report as well as the Judge's decision grounds have been taken by the plaintiffs and the fourth defendant, that the accounts are all fabricated and they should not have been relied upon. But it is now too late to dispose of the appeals on this point alone because there is other evidence adduced by both sides regarding what should be charged and what should not be charged.

In regard to the grounds of appeal, though amounts are not mentioned in the grounds, objections relating to these amounts have all been stated except as regards the fabrication of accounts which is a general one. They will have to be gone into as these are first appeals.

Turning to the question of Court-fee, the plaintiffs appealing from a final decree can value notionally, because the language used in section 7, clause (*iv*) (*f*) is "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal". The Privy Council in *Faizullah Khan* v. *Mauladad Khan*,[1] has construed this language as entitling the plaintiffs to notionally value the claim both in the suit as well as in the memorandum of appeal, even though the appeal may be against the final decree and as against the ascertained amount. This

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* C.C.C. Appeal Nos. 59 and 64 of 1949. 10th August, 1956.

[1] (1929) 57 M.L.J. 281 : I.L.R. 10 Lah. 737 : L.R. 56 I A. 232 (P.C.).

Privy Council decision has been followed in an un-reported decision of a Division Bench of this Court in S.A. No. 1141 of 1934 (reported at page 12 of Summary of Recent Cases in 49 Law Weekly) and in the decision of a single Judge in *Ramadoss v. Appalanarasayya*[1]. The plaintiffs therefore can maintain C.C.C. A. No. 64 of 1949 notwithstanding their valuation of the same at Rs. 100. The only thing they have now to be asked to do is to state the amount involved in each objection.

In regard to the appeal preferred by the fourth defendant, C.C.C.A. No. 59 of 1949, it stands on a different footing. We cannot hear his appeal unless he gives us an abstract of the amounts claimed by him under various heads and then he will have to pay Court-fee thereon. It is no doubt true that the distinction between the plaintiff and a defendant who sails with him is a distinction without a difference. In fact in this case both the plaintiffs and the fourth defendant sail together. But the language of section 7, clause (*iv*) (*f*) of the Court-fees Act specially applies only to a plaintiff but does not extend that immunity to a defendant appealing.

We have considered the idea whether this distinction without difference can be made the subject matter of a reference to the Full Bench. But we have got the Privy Council decision cited above and followed in other decisions of this Court on the same lines; and secondly, the Court-fees Act has been radically amended and now even a plaintiff appealing from a final decree must pay the Court-fee on the ascertained amount. Therefore, it might be considered not worthwhile to investigate this point and make it the subject-matter of a reference to a Full Bench. So far as it is known, no other High Court seems to have taken a different view, which is also a matter to be borne in mind.

The net result it seems to us is that notice should be given to the appellants, re-opening the matter, and direct the plaintiffs to file an abstract of the amounts claimed by them and the fourth defendant to do so similarly and pay Court-fee.

Similarly, the cross-objectors should be asked to state the precise amount in dispute and in case they want a decree in their favour, we may ask them to pay Court-fee thereon in addition to what they have already paid, *viz*. for the amounts decreed against them. Time given for filing the abstract and payment of Court-fee one month from the date failing which the Appeal No. 59 of 1949 will stand dismissed with costs.

P.R.N. *Parties directed to file abstracts of amounts claimed by them.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

M. Sadasivam .. *Petitioner**

v.

State of Madras, by the Assistant Inspector of Labour .. *Respondent.*

Madras Shops and Establishments Act (XXXVI of 1947), *section* 11 (1)—*Scope and validity—If opposed to Article* 19 (1) (*g*) *of the Constitution of India* (1950)—*Provision as to complete closure of shop for one day in the week—What amounts to compliance with the provision.*

Section 11 (1) of the Madras Shops and Establishments Act provides that establishments which come within the category of shops and establishments as defined by the Act should remain entirely closed for at least one day in a week. The words 'entirely closed' mean entirely closed for the trade or business and it signifies that even the employer or persons exempted from the Act such as for example persons in the position of management, cannot transact business on a closed day. The object of the provision is to prevent sweating of labour under the guise of staggering which no amount of inspection could eradicate. The provision is not of an arbitrary or excessive nature and do not go beyond what is needed in the interests of the public. The section does not therefore offend the Constitution of India.

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[1] (1943) 2 M.L.J. 347.

* Cr. R.C. No. 71 of 1956. 1st October, 1956.
(Cr. R.P. No. 61 of 1956.)

The mere fact that an employer gives each of the workers in his establishment one complete holiday in the week does not in any way relieve him from the obligation to keep the establishment closed entirely for one day in the week.

[Exemption of Hair Dressers from the provision, as in other States, suggested.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Second Presidency Magistrate dated 26th December, 1955 and made in C.C. No. 11265 of 1955.

R. M. Seshadri, for the Petitioner.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*), for State.

The Court made the following

ORDER.—This is a Criminal Revision preferred against the conviction and sentence by the learned Second Presidency Magistrate, Madras, in C.C. No. 11265 of 1955.

The facts are: The petitioner M. Sadasivam is the proprietor of a hair-dressing saloon. Under the Madras Shops and Establishments Act (hereinafter called the Act) he had specified Monday as the weekly holiday for the saloon and had exhibited a notice to that effect in the saloon. On 26th September, 1955, which was a Monday he was found running the saloon and serving customers with the assistance of 12 persons. Therefore, he had been prosecuted and convicted under section 45 (1) of the Act for contravening the provisions of section 11 (1) of the said Act.

The case for the revision petitioner was two-fold. First of all, that he had applied to Government that he was going to work on a shift system and that the shop would not be wholly closed on any day and that he proposed to give each worker a complete holiday every week and that he should be granted exemption from the provisions of section 11 (1) of the Act. There is no evidence that this revision petitioner has been granted any such exemption. If this exemption applied for had been granted, then it would be a complete answer. But such not being the case, we have to consider the next contention raised by this revision petitioner. It is common ground that the revision petitioner gives all his workers one day's holday in a week in conformity with the provisions of section 11 (2) of the Act.

On the foot of that it is contended by the revision petitioner that section 11 (1) of the Act providing for a complete closure of the shop for one day in the week offends the provisions of Article 19 (1) (*g*) of the Indian Constitution which lays down that all citizens shall have the right to practise any profession or carry on any occupation, trade or business, that when the revision petitioner gives every worker, a holiday in conformity with the provisions of section 11 (2) of the Act, he is not bound to completely close his shop for one day in the week, that section 11 (1) of the Act is an unreasonable restriction and interference with his right to the practice of his trade or business, that it is not a reasonable restriction on the exercise of the said right in the interests of the general public protected by clause 6 of Article 19, that the Act has been designed only to give workers in the shops one day's holiday in the week and that this intention of the Act is amply fulfilled by the restriction imposed under section 11 (2) compelling an employer to give each worker a day's holiday in the week and that the employer is entitled to conduct his business in such a manner that he gives a day's holiday in the week to all the workers by working on a shift system spread over the week, without actually closing the shop on any particular day of the week. The learned Magistrate had, therefore, considered whether a reference should be made to the High Court or not. But he did not make a reference because he states that after giving the question his careful and anxious consideration, he was of opinion that section 11 (1) of the Act is not *ultra vires*. This is made a ground for revision in that the learned Magistrate erred in declining to make a reference to this Court under Section 432 of the Criminal Procedure Code on the constitutional validity of section 11 (1) of the Act.

The point for consideration, therefore, is whether when the revision petitioner gives each of his workers a day's holiday in a week and complies with the provisions of section 11 (2) of the Act, a compulsory closure of the shop for a day in the week as provided by section 11 (1) of the Act is an unreasonable, arbitrary and excessive restriction beyond what is required in the interests of the general public and the closure is *ultra vires*.

To determine the point raised by the learned advocate for the revision petitioner it is necessary to set out section 11 of the impugned Act and the analogous provisions in the Shops and Establishments Act of other Indian States and in the parent Act *viz.*, the English Shops Acts. Then we shall have to consider the object of enacting section 11 of the impugned Act and the social evils, it is intended to cure and then finally consider whether these restrictions fall within the scope of the legitimate restrictions permissible under Article 19 of the Constitution of India.

The literature on the subject of the Shops and Establishments Act is sparse. But fortunately for the Madras Shops and Esbtablishments Act, we have the commentary by C. L. Aravamudha Iyengar (P. Varadachary & Co.) and for the Shops and Establishments Acts of other States, Volume II of the Law Relating to Service in India, by Barwell & Kar (Oriental Longmans Ltd.) and for the English Shops Acts, Wilkinson's The Shops Act 1912-1938, Third Edition (1947) and for the Shops Acts of 1950, Stone's Justices' Manual being the Justices' Yearly Practice, Volume 2, 1956, Special India Paper Edition, pages 2211 and following.

Section 11 of the Madras Shops and Establishments Act runs as follows :—

> " (1) Every shop shall remain entirely closed on one day of the week which day shall be specified by the shop-keeper in a notice permanently exhibited in a conspicuous place in the shop ; and the day so specified shall not be altered by the shop-keeper more often than once in three months.
>
> (2) Every person employed in a shop shall be allowed in each week a holiday of one whole day :
>
> Provided that nothing in this sub-section shall apply to any person whose total period of employment in the week, including any days spent on authorised leave, is less than six days, or entitle a person who has been allowed a whole holiday on the day on which the shop has remained closed in pursuance of sub-section (1) to an additional holiday ".

The Bengal Shops and Establishments Act XVI of 1940 the first of its kind in India, lays down that every shop must be entirely closed on at least one-and-a-half days each week and every person engaged in a shop must be allowed that period as holidays and that a notice shall be conspicuously displayed by the shop-keeper at the shop specifying the day and half-day for which the shop is closed. (Barwell & Kar, page 179 and following).

The Central Provinces and Berar Shops and Establishments Act (XXII of 1947) provides for weekly and fortnightly holidays *viz.*, one day in the week without deduction in wages for shops and commercial establishments and one day in a fortnight without any deduction in wages for restaurants, eating-houses, theatres or other places of public entertainment or amusement. As in the Bengal Act provision is made for the exclusion of certain establishments and persons from the operation of the Act and they do not include barbers' and hair-dressers' saloons, The establishments in which the members of the family of the employer were employed are excluded from the operation of the Act (Barwell & Kar, page 183 and following).

The United Provinces Shops and Commercial Establishments Acts (XXII of 1947) provides that shops and commercial establishments not included in the schedule to the Act, shall be closed on one day of the week (referred to as ' a close day ' in the Act) and also on all holidays for government treasuries, and that the close day shall not be altered except once in a year, with effect from 1st January, of the year and that such alteration shall be effected by a notice displayed conspicuously at the shop not later than 15th December. It was also provided that every employee of a shop or commercial establishment, whether included in the schedule or not, except a watchman or caretaker, shall be allowed a holiday of one whole day in every week (section 11). The schedule referred to above includes as No. 6, to which the provisions of sections 6, 10 and 11 shall not apply, shops and establishments of barbers and hair-dressers. (Barwell & Kar, page 187 and following).

The Bombay Shops and Establishments Act (LXXIX of 1948) repealing the earlier Bombay Shops and Establishments Act, 1939, provides in section 18 that every shop and commercial establishment shall remain closed on one day of the week and that no deduction shall be made from the wages of employees for such closure and that at the beginning of each year, a list of such closing days shall be prepared by the employer and conspicuously exhibited in the shop or commercial establishment, that the Inspector should be notified of the list and that the employer may keep the shop or establishment open on any day notified as closed, provided shop or establishment is closed on some other day in the same week and that the Inspector is notified to that effect at least seven days before the notified day or the closed day, whichever is earlier. In schedule II setting out the employees and establishments exempted from the provisons of sections 10, 11 and 13 to 18 of the Act, the establishment of barbers and hairdressers is not found (Barwell & Kar, page 189 and following). *See also* S. S. Borker's Bombay Shops and Establishments Act of 1948, page 35 and following and Khandekar's Bombay Shops and Establishments Act of 1948, page 315 and following.

The Bihar Shops and Establishments Act VIII of 1954 is of very recent origin and is meant to apply in the first instance to areas comprised within a municipality, or a notified area, or a municipal corporation and to any mining settlement for which a Mines Board of Health has been established. The barber's and hairdressers' saloons are not included in the establishments exempted from the provisions of this Act. Provision has been made for the keeping of every establishment entirely closed on one day of the week and for granting a full holiday on that day to all employees, without any deduction from their wages. (Barwell & Kar, page 202 and following).

A Bill known as the Orissa Shops and Establishments Bill, was introduced in the Orissa Legislature in 1953, but the Orissa Government ultimately decided to drop it, so that when Volume II of Barwell & Kar's book was published in February, 1956, there was no such statute in Orissa.

The Punjab Trade Employees Act X of 1948, although differently named from the statutes of the same nature framed by other States, was intended to limit the hours of work of shop assistants and commercial employees and to make certain regulations concerning their holidays, wages and terms of service. It now applies to the State of East Punjab and to Delhi State. In the shops and commercial establishments exempted from the provisions of sections 6 and 7 of the Act, shops of barbers and hairdressers are included. By section 7 of the Act it is provided that every shop and commercial establishment shall remain closed on the close day, which means the day of the week on which the shop or commercial establishment remains closed. The choice of the day rests with the occupier and he may change the day once every year by notifying the prescribed authority at least fifteen days before the change is effected. The occupier may open his shop or establishment on a close day, if such day coincides with religious festival subject to the conditions that he had kept his shop or establishment closed on either of the two preceding days, and had given notice to the prescribed authority of his intention to keep the shop or establishment open on the close day. (Barwell & Kar, page 204 and following).

The Sind Shops and Establishments Act XVIII of 1940 is the last of the series of Acts and though Sind is now a province in Pakistan and although this Act was passed in 1940 before the establishment of Pakistan, it is still in force in Sind with such amendments as have been made up-to-date. The Bengal Shops and Establishments Act is in force in East Pakistan. Section 4 deals with exemptions which are similar to the exemptions in other States. A weekly holiday is provided for the employees of shops, as also of commercial establishments without deduction of wages.

Turning to the parent English Acts, in view of the Shops Act of 1950, replacing the earlier Acts, it is unnecessary to examine the Shops Act from 1912 to 1938 which have been set out in Wilkinson's Shops Acts, 1912-1938, Third Edition and in Halsbury's Laws of England, Second Edition, 14th Volume, pages 674 to 695. The substance of these Shops Acts which has also been embodied in the Shops Act, 1950, in so far as holidays and shops assistants are concerned, is that at least on one week-day in each week (in the case of Jewish hairdressers' or barbers' shops open on Sunday, one day in every week other than Saturday) a shop assistant must not be employed about the business of a shop after half past one in the afternoon. The occupier must fix and specify in a notice in the prescribed form, which must be fixed in the shop in such manner and time as may be prescribed, the day of the week on which the shop assistants are not employed after 1-30 P.M. He may fix different days for different shop assistants. Then every shop shall, save as otherwise provided by Part IV of the Shops Act of 1950, be closed for the serving of customs on Sunday. It is unnecessary for our purpose to deal with the limited exemptions thereunder.

Having examined the provisions of the Shops Acts in other States of India and the parent Acts of England, we shall now consider the object of enacting section 11 of the impugned Act and the scocial evils it was intended to cure.

The statement of objects and reasons in regard to the Madras Shops and Establishments Act (XXXVI of 1947) is as follows :

> "There is no enactment in this Province regulating the conditions of work of employees in shops, commercial undertakings, restaurants, etc. The Weekly Holidays Act, 1942 (Central Act XVIII of 1942) which has been brought into force from 1st January, 1946, is limited in scope in that it provides only for the grant of holidays and does not contain provisions for various other matters affecting them, such as hours of work, payment of wages, health and safety. It is considered that there should be a comprehensive measure in this Province to regulate these matters on the lines of similar enactments in force in other Provinces. The Bill is intended to give effect to this object."

The preamble to this Act states that it is intended to provide for the regulation of conditions of work in shops, commercial establishments, restaurants, theatres and other establishments and for certain other purposes.

The circumstances leading to the introduction of this Act are set out by Mr. C. L. Aravamudha Ayyangar in his book at pages 3 and 4 as follows :

> "This Act is intended to protect certain classes of employees who work for wages in establishments. It does not govern the conditions of work, wages, etc., of labourers employed in factories, industrial undertakings, in agriculture and plantations. The Factories Act of 1934, the Mines Act of 1923, the Indian Dock Labourers Act of 1934 and various other laws in the Statute Book of Indian Laws regulate the conditions of work in specific industrial undertakings. This Act is made applicable to persons employed in shops, in clerical departments of factories and industrial undertakings, commercial establishments like Banks, Insurance Companies, etc. and for theatres and restaurants. No benefits are conferred by this Act to the near relations of the employer who depend upon him and who live with him. Under section 4 of this Act, the persons and establishments to whom and which this Act does not apply are set out.
>
> " As would appear from a study of the growth of labour legislation at the Centre and in our province particularly, though workers in factories and in industrial undertakings had their conditions of work regulated, shop assistants and commercial employees had no benefit of legislation, until they were granted holidays under the Weekly Holidays Act, 1942. But the Province of Bombay went ahead of the other Provinces by passing the Bombay Shops and Establishments Act, 1939, with regard to giving relief to such type of workers though it began its attempts to introduce such a measure from the year 1936 onwards, when, with the then Government, it did not find much favour. An enquiry was conducted by the Bombay Government Labour Department and the conditions of hours of work were surveyed with respect to retail trade establishments. The report published in 1936 by the Bombay Government showed the average daily hours of work ranging between 11 and 14 hours a day, while in vegetable and fruit shops, even a 16 hour-a-day work was found very common. Such a state of affairs led to State interference.
>
> In Madras City and other municipal areas and major panchayats in the province, the persons employed in shops, commercial establishments, theatres, restaurants, etc., are overworked. Excepting perhaps in the City of Madras, in all mofussil towns, shops remain open throughout all the days of the week, which, however, was avoided by the introduction of the provisions of the Weekly Holidays

> Act, 1942, on and from 1st January, 1946. Restaurants and theatres, which did [illegible] on any day were forced to grant weekly holidays to all its employed persons and adopt [illegible] of work. It is no doubt true that the commercial establishments, like banks and insurance [illegible] said to be closed on Sundays and other public holidays declared under the Negotiable Instruments Act, but it will be seen that the employees attend their offices on such days to clear off arrears of work and the intention of rest underlying the grant of holidays is not achieved practically . . . ."

That is why closure on one day in the week of the shop or establishment itself is being insisted and where Sunday closing as such is not in the interests of public welfare and where holiday given to each employee on one day in the week can be so staggered that the shop can be kept open all round the week, powers have been taken by the Government under section 6 of the Act which lays down :

> " The State Government may, by notification, exempt, either permanently or for any specified period, any establishment or class of establishment, or person or class or persons from all or any of the provisions of this Act, subject to such conditions as the State Government deem fit ".

This is an enabling clause not intended to undo the whole Act itself but for properly administering the Act.

To sum up, establishments which come under the category of shops within this enactment are bound to remain entirely closed for at least one day in the week. This compulsory closure is not laid down for establishments other than shops. Section 11 (1) is a reproduction of section 3 (1) and (2) of the Weekly Holidays Act, 1942. The words " entirely closed " mean entirely closed for the " trade or business ". No person employed can be allowed to work therein, or engage himself in the trade or business, though the premises of the shop may be opened for certain incidental purposes by the proprietor or the employer. The word " entirely " signifies that even the employer or persons deemed in law to be such, or persons exempted from the Act, by reason of their being in position of management cannot transact business on a close day. The compulsory closure of shops not only enforces the grant of holidays to the workers but also effectively prevents any evasion thereof by pretence of staggering and which no amount of inspection can always eradicate. It also incidentally gives the employer one day's compulsory dissociation from business which is also good to him and promotes efficiency because " all work and no play makes Jack a dull boy ". In cases where public welfare dictated that the shops must be run for all the seven days in the week, shops can be exempted by order of the Government and such shops need [illegible] their premises nor put up any such notice board. But the employers are [illegible] to grant their employees a holiday of one whole day in every week. When [illegible] remain closed for a day in the week, that day will be construed to be a holiday granted to the person employed in the establishmnent and such person will not be entitled to a additional holiday.

Barbers' and hairdressers' saloons have received favoured treatment at the hands of the States in India and have been exempted and in fact even in England, there has been a special Hairdressers' and Barbers' Shops (Sunday Closing) Act 1930, which lays down " subject as stated below, it is unlawful for any person to carry on the business of hairdresser or barber on Sunday ". Any person carrying on the business of a hairdresser or barber may, hoewever, at any time, for the purpose of that business, attend any person (1) in any place, if that person is unable, by reason of bodily or mental infirmity, to go to the place where such business is carried on ; or (2) in any hotel, if that person is resident therein ; or (3) in any sea-going ship. This does not authorise the employment of a shop assistant in or about the business of a shop when under the Shops Acts, 1912-1918, it would be unlawful for him to be so employed. In the case of Jewish barbers and hairdressers Saturday is substituted for Sunday.

On this analysis can it be said that section 11 (1) of the Madras Shops and Establishments Act offends Article 19 of the Constitution of India ?

Article 19 (1) of the Constitution of India lays down :

> " (1) All citizens shall have the right—
>
> * * * * * * *
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business."

While the right to pursue any lawful occupation or calling is recognized in every democratic country, yet the right of the State to regulate such a business where its unregulated operation may injuriously affect the welfare of others is equally well settled. The right to liberty and pursuit of happiness includes the right to employ one's faculties and property in a gainful occupation of his own choosing. While it is properly spoken of as fundamental and inalienable, it is nevertheless qualified to the extent that the sovereign power may interfere with its enjoyment through regulations necessary or proper for the natural good of the members of the whole social body. Therefore, this right has never been regarded as absolute by either the English or the American or the Indian Law.

Under the Fourteenth Amendment of the American Constitution a person cannot be deprived of his property without due process of law, property in the context having been interpreted to mean and include any trade, business or enterprise. But when a person devotes his property to an use in which the public has interest, his business is said to become affected with a public interest and then it has been held in the United States of America that it can be controlled by the States in the exercise of its police power in the interest of the common good.

In a recent case the Supreme Court has taken the view that the theory of being clothed with public interest is little more than a fiction and forms only an unsatisfactory test. The true rule is that an industry is for an adequate reason subject to control for the public good.

The Indian Constitution avoids such controversy by providing in Article 19 (6) that any business or trade, irrespective of its nature, is liable to be controlled or restricted by the State if necessary in the interests of the general public.

The expressions "reasonable" and "interests of the geneal public" are both elastic terms and a discussion of the full import of these expressions necessarily involves a discussion of the political, social and economic problems of the present day not only in this country but all over the world. In order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in the trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community.

On these propositions it follows that the freedom referred to in Article 19 (1) (*g*) of the Constitution of India does not mean freedom to carry on trade or profession in a way which may be prejudicial to the public interest. The avowed object of the Shops and Establishments Act can be gathered from the statement of objects and reasons, the preamble to the Act and the circumstances under which the said Act came to be passed and the similar Shops Acts prevailing in England and which have all been set out above and show that this Act came to be passed in order to prevent sweating of labour and any possible evasion thereof and to provide for compulsory rest for the unexempted shop employer also in the interest of efficiency conducive to the public welfare. These restrictions are not arbitrary or of an excessive nature and do not go beyond what is required in the interests of the public. Powers have also been taken to exempt shops and establishments in regard to which public interest require that they should be kept open on all days of the week.

In *Matrumal* v. *Chief Inspector of Shops, etc., Kanpur*[1], this very point, *viz.*, whether provisions like section 11 of the impugned Act offend Article 19 (1) of the Constitution came to be considered. A Bench of the Allahabad High Court held :

> "The argument relating to the infringement of the freedom to practice the profession of their choice or to carry on any occupation, trade or business rests on three features of the Act. It is urged

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[1] A.I.R. 1952 All. 773.

that inasmuch as the Act (1) regulates the hours of regular and overtime work of the employees; (2) regulates the number of holidays and the extent of sick leave and (3) necessitates the keeping of registers of attendances, fines and overtime work, etc., 'infringes the applicants' right to practice their trade as halwais or restaurant-keepers.

Sub-article (6) of Article 19 lays down that nothing in Article 19 (1) (*g*) shall affect the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of the right of freedom of profession in the interest of the general public and in particular nothing in the sub-clause (*g*) shall affect the operation of any existing law in so far as it prescribes the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. The freedom referred to does not mean the freedom to carry on a trade or profession in a way which may be prejudicial to the public interest and it has, for example, been generally recognised that the State may validly prohibit gambling or immoral occupation, the employment of child labour in certain industries, the licensing of certain kinds of business in the interest of the public safety or regulate the conditions for the manufacture of foodstuffs or chemical products, etc.

The avowed object of the Act as shown by its preamble is to provide for holidays and to regulate and lay down conditions of and the hours of employment in shops and commercial establishments. It is made applicable to all cases falling outside the purview of section 4 where labour is employed. The regulation of the hours of work of the employees or the prescription of holidays and sick leave or the insistence on the observance of the legislative requirements to keep proper records of attendance fines or overtime work, does not, it would seem, *prima facie* deny the freedom of profession. Its underlying purpose is to prevent what is called "sweating of labour" by persons who by nature of their position as employers have a dominant voice and are apt to use it for their own benefit rather than for the benefit of their own employees".

The only point of substance that can be urged is that barbers' and hair-dressers' saloons in the City had not been treated in the same way as in other States and in England, having regard to the public requirements. The remedy is in the hands of the petitioner and it is for the barbers and hairdressers of this metropolitan area to move the State Government for exempting their establishments under section 6 of the impugned Act. There is no reason why on such an application the State Government should take an unreasonably different view from the other States.

This Revision is, therefore, dismissed.

R.M. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMASWAMI GOUNDER.

Pavadai Goundan .. *Accused**.

Madras Prohibition Act (X of 1937), *section* 48—*Construction*—"*Shall also forward to such Magistrat a report setting forth the name of the accused*" . . . . *upon receipt of such report the Magistrate shall inquire into such offence*. . . . *in such manner as if complaint had been made before him as prescribed* . . . . *Interpretation and effect of—Police officer investigating offence under the Act and filing charge under Chapter XIV of the Criminal Procedure Code—Procedure for trial—Section* 251-*A*, *or section* 252, *Criminal Procedure Code—Trial according to section* 252—*Legality—Effect on conviction.*

The report referred to in section 48 of the Madras Prohibition Act may be forwarded either by a Police Officer or a Prohibition Officer. A Police Officer may send the report either under section 173 (1) of the Criminal Procedure Code after his investigation, in accordance with Chapter XIV of that Code, or he may send the report like the Prohibition Officer who investigates into an offence under the Act in accordance with Chapter V of the Prohibition Act. In the latter case the report of the Police Officer is on a par with the report of the Prohibition Officer and that would be dealt with by the Magistrate to whom it is forwarded, as if it were a complaint made before him. In such a case the provisions of section 252 of the Criminal Procedure Code would apply.

Where the Police Officer investigates into the offence under the Prohibition Act under the provisions of Chapter XIV of the Criminal Procedure Code and sends his report under section 173 (1) of the Code, it would be a charge such as it is commonly known. In such cases the procedure to be followed is the one prescribed in section 251-A of the Criminal Procedure Code.

Where it is clear that in a particular case a Police Officer follows the provisions of Chapter XIV of the Criminal Procedure Code and files a charge sheet, it is a charge sheet under section 173 (1), Criminal Procedure Code, and, therefore, the procedure to be followed is the one laid down in section 251-A, Criminal Procedure Code. If, instead, the procedure prescribed by section 252 is followed, the conviction and sentence will have to be set aside on the ground of wrong procedure.

Desirability of deleting Chapter V of the Prohibition Act, excepting section 53 and making it obligatory on the part of the Police Officers to follow only the procedure laid down in Chapter XIV of the Code recommended to State Government.

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*Crl.R.C. No. 313 of 1956. 24th October, 1956.
(Taken up No. 19 of 1956).

Case taken up by the High Court on perusal of the Calendar and Judgment in Criminal Appeal No. 16 of 1956 on the file of the Court of the District Magistrate and Assistant Sessions Judge of South Arcot, Cuddalore, (C.C. No. 201 of 1956, Sub-Magistrate, Gingee).

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) for State.

G. Gopalaswami (*amicus curiae*).

The Order of the Court was made by

Somasundaram, J.—This is a reference by the District Magistrate (Judicial) of South Arcot. The reference is made under the following circumstances. On 31st December, 1955, at about 10-30 P.M. there was a prohibition raid in a place called Vinayagapuram, hamlet of Adanur village in South Arcot district. The raid was conducted by the Head Constable of Thambur outpost with the aid of two constables and two mahazar witnesses. The accused was caught red-handed while distilling arrack. M. Os. 1 to 7 were seized. They included utensils and other vessels used for distilling arrack and fermented wash. The accused was also arrested and sent to the Sub-Inspector of Police at Kanjanoor within whose limits the offence took place with a special report by the Head Constable who conducted the raid. The Head Constable at Kanjanoor police station who received the accused as also the report and the material objects seized during the raid from the Head Constable of Thambur, registered a case in Crime No. 1 of 1956 under section 4 (1) (*b*) of the Madras Prohibition Act and investigated the case. The Sub-Inspector of Police supervised investigation and filed a charge-sheet. The case was taken on file by the Sub-Magistrate at Gingee as C. C. No. 201 of 1956 for an offence under section 4 (1) (*b*) of the Madras Prohibition Act. Thereafter the accused was tried and convicted and sentenced to three months' rigorous imprisonment. The accused preferred an appeal against his conviction and sentence to the Assistant Sessions Judge (District Magistrate), South Arcot. In the appeal several grounds of fact and law were taken. One of the points of law raised was that the trial Court erred in following the procedure prescribed in section 251-A of the Criminal Procedure Code and that the correct procedure to be followed as regards cases under the Madras Prohibition Act is the one laid down in section 252 of the Criminal Procedure Code. This argument was based on the construction of section 48 of the Madras Prohibition Act which runs as follows :

> "When a police or prohibition officer forwards in custody any person accused of an offence under this Act to the Magistrate having jurisdiction to inquire into or try the case, or admits any such person to bail to appear before such Magistrate, such officer shall also forward to such Magistrate a report setting forth the name of the accused person and the nature of the offence with which he is charged and the names of the persons who appear to be acquainted with the circumstances of the case, and shall send to such Magistrate any article which it may be necessary to produce before him. Upon receipt of such report the Magistrate shall enquire into such offence and try the person accused thereof in like manner as if complaint had been made before him as prescribed in the Code of Criminal Procedure".

The section authorises the Police Officer or the Prohibition Officer to forward to the Magistrate a report who on receipt of such a report is to deal with the matter as if a complaint had been made before him as prescribed in the Code of Criminal Procedure. Complaint is defined in sub-clause (*h*) of section 4 of the Criminal Procedure Code. It is as follows :

> "Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown has committed an offence but it does not include the report of a Police Officer".

It would be seen from the above definition that it does not include the report of a police officer. It was, therefore, contended that the report of the police officer referred to in section 48 of the Prohibition Act is not a charge-sheet filed under section 173 of the Criminal Procedure Code but is treated as a complaint. If that is so, then the procedure to be followed by the Magistrate is the one prescribed in section 252 and not the one laid down in section 251-A of the Criminal Procedure

Code and that section 251-A will apply only to reports forwarded by the police officers under section 173 (1) of the Criminal Procedure Code. This contention raised by the advocate for the accused was upheld by the District Magistrate and he, therefore, set aside the conviction and sentence and ordered re-trial with a direction to the Magistrate to follow the procedure prescribed in section 252 of the Criminal Procedure Code. In the re-trial the case was renumbered as C.C. No. 508 of 1956 and the procedure prescribed in section 252 of the Criminal Procedure Code was followed. The accused was again convicted of the offence with which he stood charged and sentenced to the same term of imprisonment.

The question for consideration now is what is the procedure to be followed in respect of offences under the Madras Prohibition Act, which are investigated by the Police Officers. Is it the procedure prescribed in section 251-A or the one that is contained in section 252 of the Criminal Procedure Code, that has to be followed? It is needless to point out that the procedure prescribed by the two sections is different and variess very much. Sections 28 to 52 of Chapter V of the Madras Prohibition Act relate to investigation of offences under the Prohibition Act by the officers who detect and deal with offences under the said Act. Such officers include officers in the Police service as also officers of Land Revenue Department. A common procedure is prescribed for all such officers. Still section 53 of the Act lays down that nothing contained in this Act shall affect the operation of the Code of Criminal Procedure. According to section 15 of the Prohibition Act all offences under that Act are cognizable and the provisions of the Code of Criminal Procedure with respect to cognizable offences shall apply to them. The procedure relating to cognisable offences is contained in Chapter XIX of the Criminal Procedure Code beginning with section 154 and section 156 *et seq.* The closing of the investigation is marked by forwarding a report under sub-section (1) of section 173 of the Criminal Procedure Code to a Magistrate who is empowered to take cognizance on a police report. This report is commonly known as "charge-sheet" by the police. The charge-sheet, therefore, presupposes an investigation by the police under Chapter XIV of the Criminal Procedure Code. Investigation of prohibition offences by the police officers under Chapter XIV of the Criminal Procedure Code is not affected by virtue of section 53 of the Prohibition Act. But under section 5 (1) of the Criminal Procedure Code all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code. But offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. We have already pointed out how in Chapter V of the Prohibition Act a special procedure is prescribed for all offences under the Prohibition Act. From the provisions of the two enactments referred to above it would be seen that the provisions contained in Chapter V of the Prohibition Act are saved by sub-section (2) of section 5 of the Criminal Procedure Code and by sections 15 and 53 of the Prohibition Act the provisions of Chapter XIV of the Criminal Procedure Code are not affected. A Police Officer who investigates into an offence under the Prohibition Act, may, therefore, either follow the provisions contained in Chapter XIV of the Criminal Procedure Code, or he may adopt the procedure contained in Chapter V of the Prohibition Act. But in the case of prohibition officers who can also investigate into offences under the Prohibition Act the procedure that is to be followed by them is that contained in Chapter V of the Prohibition Act (sections 28 to 52). Bearing this distinction in mind between, the procedure to be followed by a police officer and a prohibition officer in respect of offences under the Prohibition Act if we examine the provisions of section 48 of the Prohibition Act the meaning of the expression "shall forward to such Magistrate a report setting forth the name of the accused"—and "upon receipt of such report the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if complaint had been made before him, as prescribed in the Code of Criminal Procedure" will become clear. The report referred to in section 48 of the Prohibition Act may be forwarded either by a Police Officer or a Prohibition Officer. The Police Officer as indicated already may send the report either under section 173 (1) of the Criminal Procedure Code after his investigation in accordance with the provisions of Chapter XIV of the Criminal Procedure Code or he may send the report like the Prohibition Officer who investigates into an offence under the Act in accordance with the provisions of Chapter V of the Prohibition Act. In the latter case the report of the Police Officer is on a par with the report of the Prohibition Officer and that would be dealt with by the Magistrate to whom it is forwarded as if it were a complaint made before him. That is to say, in such a case the provisions of section 252 of the Criminal Procedure Code will apply. But in the former case, that is, where a Police officer investigates into an offence under the Prohibition Act under the provisions of Chapter XIV of the Criminal Procedure Code and sends his report under sub-section (1) of section 173 of the Criminal Procedure Code it would then be a charge-sheet as it is commonly known. In such cases the procedure to be followed is the one prescribed in section 251-A of the Criminal Procedure Code.

On the facts of this case it is clear that the Police Officer followed the provisions of Chapter XIV of the Criminal Procedure Code. Therefore what was filed by him was a charge-sheet under sub-section (1) of section 173 of the Criminal Procedure Code and, therefore, the procedure to be followed is the one laid down in section 251-A of the Criminal Procedure Code. The procedure adopted by the Magistrate in the first instance, that is, in C.C. No. 201 of 1956 was the correct one and the order of the District Magistrate directing retrial was not justified. In pursuance of the order of the District Magistrate the accused was again retried and again convicted and sentenced. This time the procedure followed by the trial Court was the one prescribed under section 252 of the Criminal Procedure Code. As the procedure followed by the Magistrate on the second occasion, that is, subsequent to the order of the District Magistrate directing retrial, is not correct, the conviction and sentence will have to be set aside. The accused has already undergone two trials and has also been in jail for a few days. In these circumstances we do not think it necessary to order retrial. We, therefore, set aside the conviction and sentence passed on the accused in C.C. No. 508 of 1956 and order no retrial.

With regard to the reference by the District Magistrate when it came up for hearing before us the accused was not represented by any counsel. We, therefore, requested Mr. G. Gopalaswami, a leading member of the Bar, to act as *amicus curiae*. We are deeply grateful to him for his able and lucid exposition of the law on the subject and for the valuable assistance he has rendered to us.

Before we take leave of this case we would like to make the following recommendation to the State Government for introducing the necessary legislation in regard to the procedure to be followed by the Investigating Officers in respect of offences under the Prohibition Act.

A Police Officer who investigates into an offence under the Prohibition Act may, as we have pointed out, either investigate the case under the provisions of of Chapter XIV of the Criminal Procedure Code or follow the procedure prescribed in Chapter V of the Madras Prohibition Act. In the latter case also the Police Officer whenever he forwards the report may term it a charge-sheet as that is the expression which is in daily use by them, though strictly it is not so.

The Court at the time of the filing of the report may not know whether the Police Officer has followed the procedure in accordance with the provisions of Chapter XIV of the Criminal Procedure Code in investigating the case or has followed the provisions of Chapter V of the Prohibition Act. It is possible that the procedure followed by the Investigating Officer may be known only at a later stage of the hearing of the case and, if it turns out that the procedure followed by the Magistrate was not correct, then the accused may have to be tried again following the right procedure. This would mean not only harassment of the accused for no fault of his but also delay in the disposal of the case. There must be some suitable provision to avoid this.

Now that the Police Officers alone are investigating into these offences under the Prohibition Act and, practically, the Prohibition Officers have ceased to exist at least so far as investigation of offences under the Prohibition Act are concerned, it would be better if it is made obligatory on the part of the Police Officers to follow only the provisions of Chapter XIV of the Criminal Procedure Code, in which case the provisions of Chapter V except section 53 of the Prohibition Act may have to be deleted. This will then give no option to a Police Officer who investigates into a Prohibition offence but only to follow the procedure in Chapter XIV of the Criminal Procedure Code. No procedural difficulty will then arise.

P.R.N. ——— *Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

The responsible authority under Nungambakkam North Town Planning Scheme namely the Standing Committee for Town Planning and Improvement, Corporation of Madras, represented by the Chairman, Town Planning and Improvement Committee .. *Appellant**

v.

N. P. Natesa Chetty ... *Respondent.*

Madras Town Planning Act (*VII of* 1920), *Scheme framed under the Act—Order under section* 19 *of the Act made prior to Constitution—Effect of Article* 13 (1) *of the Constitution.*

Once the scheme under the Town Planning Act is notified and published and it is otherwise valid, the Responsible Authority empowered under the Act is entitled to make the order under section 19 of the Act. Article 13 (1) of the Constitution would not affect a scheme framed before the Constitution came into force and the liability under the scheme also accrued before the Constitution and the suit itself was filed before the Constitution.

Keshavan Madhavan Menon v. *The State of Bombay*, (1951) 1 M.L.J. 370 : 1951 S.C.J. 182 (S.C.).

Qasim Razvi v. *State of Hyderabad*, (1953) S.C.R. 589: (1953) S.C.J. 151 (S.C.), referred.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Rajagopalan, dated 28th July, 1950, in C.S. No. 175 of 1949 on the file of the High Court on its Original Side.

V. K. John for *Messrs. John and Row* for Appellant.

K. Narasimha Ayyar for *R. Venkatasubba Rao* and *B. Punyakoti Chetti* for Respondent.

The judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the Judgment of Rajagopalan, J., disposing of a suit C.S. No. 175 of 1949 on the Original Side of this Court. The defendant is the appellant. It is a statutory body constituted under the provisions of the Madras Town Planning Act and described as the responsible authority under the Nungambakkam North Town Planning Scheme. Actually, this body is identical with the Standing Committee for Town Planning and Improvement, Corporation of Madras, represented by the Chairman, Town Planning Scheme. The plaintiff who is the respondent in the appeal is the owner of the houses and premises called "Unsworth" and "Sandown" bearing door numbers 10 and 11 respectively in Sterling Road, Nungambakkam, and the adjoining vacant sites bearing Survey No. 537, measuring in all about 4 acres and 70 cents in Nungambakkam High Road, Madras. By their order dated 13th June, 1941, the Provincial Government sanctioned under sub-section (3) of section 14 of the Madras Town Planning Act, 1920, a scheme called the Nungambakkam North Town Planning Scheme, Madras, which had been approved by the Madras Corporation Council subject to certain modifications. The scheme was duly notified in the *Fort St. George Gazette* in September, 1941. The area to which the scheme applied was delineated on two maps attached to the scheme, which was appended to the Government Order sanctioning it. Admittedly, the plaintiff's properties fall within this area. For purposes of this appeal, the following are the only material provisions of the scheme :

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* O.S. Appeal No. 121 of 1950. 24th February, 1955.

"7. (1) All new and future streets given in Scheme III (Form No. 8 of the Rules) shall be constructed by the responsible authority or the owners as the case may be on the lines shown in Map Nos. 3 and 4 (T.P. No. 23/38-39) provided that reasonable modifications may be made by the Council with the approval of the Director).

(2) New streets AA, CG.H. 3 and widening of streets all round the temple shown on Map Nos. 3 and 4 (T.P. No. 23/38-39) shall be constructed by the responsible authority within such time and in such order as the Council may decide. Whenever any owner has been required to leave or has left lands freely for any of these streets the Council shall levy only such portion of the betterment contribution as it may decide or may forego its claim entirely.

3. All other streets shown on Map Nos. 3 and 4 (T.P. No. 23/38-39) shall be constructed by the owners in accordance with sections 215 and 216 of the Municipal Act subject to the provisions of the Scheme.

4. Any private streets that may be permitted in the area shall conform to the scheme lay out and comply with the following conditions unless otherwise sanctioned by the responsible authority in consultation with the Director :

(a) Every private street shall be at least 33 feet in width except in the areas declared under clause 8 (b) for hutting or poor class housing where it shall not be less than 20 feet.

(b) Every lane or secondary access that shall be provided whenever necessary to any premises for giving access to the latrine or for the removal from the premises of house refuse or other matter so long as such lane or access is not intended to form the principal approach or means of access to any building shall be at least 10 feet in width.

5. Sections 215 to 219 of the Municipal Act apply to the construction of new private streets, in so far as they do not contravene the provisions of the scheme.

* * * * * *

9. Any land in the area required for the purposes of the scheme may be acquired by purchase, exchange or otherwise subject to the provisions of the Act.

The notification of the scheme under sub-section (5) of section 14 of the Act in the *Fort St. George Gazette* shall, in respect of any land mentioned in Schedule V (Form 9 of the Rules) operate as a declaration under section 6 of the Land Acquisition Act, 1894, for acquisition for purposes of the Scheme."

Schedule 3 gives a list of new streets and existing streets which had to be widened. Among the new streets is one shown in the map DD running north to south of a total length of 1,600 feet × 40 feet as being one of the roads to be constructed by private parties. This proposed road runs through the entire extent of the plaintiff's land and through the compound of one of his two houses mentioned above, namely, "Sandown". On 12th December, 1946, the responsible authority appointed as such to carry out the scheme made a provisional order in exercise of the powers conferred on them under section 19 (1) of the Town Planning Act requiring *inter alia* the plaintiff to execute within a specific period that part of the road DD which ran through the plaintiff's property. A copy of the order was served upon the plaintiff on 7th January, 1947. The plaintiff objected to this notice by his letter dated 16th January, 1947. But this objection was overruled and the plaintiff was informed by letter that the provisional order had been confirmed. The confirmation was made by the responsible authority on 14th July, 1947 (Exhibit D-4). This was done after notice to the plaintiff and after considering his objection. The plaintiff preferred an appeal to the Government against this order of confirmation, but the appeal was dismissed by the Government by their order dated 20th November, 1947. The plaintiff failed to carry out the work specified in the original order namely, the construction of a portion of the DD road and thereupon the defendant authorised the Commissioner, Corporation of Madras, to construct that part of the road DD and to recover the expenses incurred thereby from the plaintiff. The notice of the proposed action was given to the plaintiff by a letter dated 6th January, 1949, from the Assistant Engineer, Town Planning, Madras (Exhibit D-5). The plaintiff protested by his letter dated 19th January, 1949. He followed it up with the institution of the suit out of which this appeal arises on 31st March, 1949. The plaintiff prayed for a declaration that the Nungambakkam Town Planning Scheme proceedings had become null and infructuous and that the scheme had ceased to exist so far as the plaintiff was concerned and for an injunction restraining the defendant from taking possession of the plaintiff's land for the proposed road and from carrying out any of the works mentioned in their notice.

The main allegations of fact and law in the plaint are as follows. As soon as the plaintiff became aware of the sanctioned scheme, he made representations to the Council of the Corporation of Madras and the Provincial Government to abandon the scheme or to modify it by deleting the road DD from the scheme. His attempts were unsuccessful. He then applied to the concerned authority for compensation for injurious affection to his property. His claim was rejected by the Arbitrator appointed under the Town Planning Act as time barred and an appeal was preferred against the order of the Arbitrator rejecting the claim to the Chief Judge of the Court of Small Causes who dismissed it on the ground that no appeal lay against the order of the Arbitrator. Though the scheme was notified as early as September, 1941, the plaintiff's land was not acquired by the defendant within the time prescribed by the statute, and consequently, the notification had ceased to have effect so far as the plaintiff's property was concerned.

The plaintiff was permitted to amend his plaint by the addition of two paragraphs (8-*a* and 11-*a*). In these paragraphs, he stated that the defendant had failed to comply with the provisions of the Town Planning Act the rules made thereunder and the provisions of the scheme and that some of the provisions of the scheme were untenable in law and invalid and inoperative; that it was beyond the powers of the responsible authority to compel the plaintiff to lay down the road DD or to surrender possession of the land required for the said road without an acquisition of the same, as the defendant could not take possession of the land without paying just compensation. Any provisions of the scheme contrary to this principle were invalid and *ultra vires*.

The defendant filed a written statement on 11th April, 1949. They were permitted to file an additional written statement to traverse the allegations in the two new paragraphs in the plaint. In this it was stated that the defendant had duly complied with the rules framed under the Act and that the scheme was neither untenable nor invalid as alleged by the plaintiff. It was incumbent on the plaintiff to construct the portion of the DD road which runs across his land, and there was no necessity to acquire any land for the purpose.

On these pleadings, the following issues were framed :—

1. Is the order made against the plaintiff under section 19 of the Madras Town Planning Act binding and enforceable against the plaintiff ?

2. Is the Nungambakkam North Area Town Planning Scheme binding on and enforceable against the plaintiff ?

3. Is the defendant under an obligation to acquire any portion of the plaintiff's property for the formation of DD road ?

4. If the defendant is under an obligation to acquire the plaintiff's land must the acquisition proceedings be commenced and completed within 3 years from the date of sanction of the scheme ?"

The learned Judge, P. Rajagopalan, J., tried the suit without recording any oral evidence and answered issue one in the negative, that is against the defendant. On issue 3 he held that there was no necessity to acquire any portion of the plaintiff's property for the formation of the DD road, because DD was not intended to be a public street. In view of this finding on issue 3, issue 4 did not arise. The learned Judge refused to give a finding on issue 2. He said :—

> " This leads to larger issues than are necessary for disposing of the main question at issue, the one underlying issue (1) whether the responsible authority was entitled to issue the directions in Exhibit D-3 in its attempt to enforce the obligations the scheme laid on the plaintiff under clause 7 (3) of the scheme.
>
> I, therefore, do not propose to answer this issue."

The learned Judge in the end granted to the plaintiff both the prayers in the plaint, namely, declaration and injunction.

Before dealing with the contentions of the appellant, it is necessary to set out the main provisions of the Town Planning Act and the rules framed thereunder.

The Madras Town Planning Act VII of 1920 was passed for the purpose of regulating the development of towns so as to secure to their present and future inhabitants sanitary conditions, amenity and convenience. A town planning scheme may provide for all or any of the several matters enumerated in section 4 of the Act. These include (*b*) the construction, diversion, extention, alteration, improvement or closure of streets, roads and communications : (*c*) the construction, alteration, removal or demolition of buildings or bridges ; (*d*) the acquisition by purchase, exchange or otherwise, of any land or other immoveable property within the area included in the scheme whether required immediately or not ; (*k*) the allotment or reservation of land for streets, roads, squares, houses, buildings for religious and charitable purposes, open spaces, gardens, recreation grounds, schools, markets, shops, factories, hospitals, dispensaries, Government and Municipal Buildings, and public purposes of all kinds. A scheme may contain proposals which may even provide for the transfer of ownership of a plot from one person to another section 5 (2) (*d*). A scheme may be initiated either *suo motu* by a Municipal Council, or at the direction of the Provincial Government. In either case, the Municipal Council has to prepare, publish and submit a draft scheme. Every draft scheme should contain particulars (section 13). The following provisions of section 14 are very material :—

> "14. (1) If within sixty days from the date of publication of a draft scheme any person affected by such scheme communicates in writing any objection or suggestion relating thereto, the Council shall consider such objection or suggestion and may modify the scheme as it thinks fit.
>
> (2) The scheme as passed or adopted by the Council together with all written objections and suggestions shall thereupon be submitted to the Provincial Government for sanction and the fact of such submission shall be published in the prescribed manner.
>
> (3) The Provincial Government may, after considering the objections and suggestions, if any, and making such inquiry as they think fit, sanction the scheme with or without modifications, or may refuse to sanction the scheme, or may return the scheme to the Council for reconsideration.
>
> (5) The sanction of the Provincial Government to a scheme under sub-section (3) shall be published by notification in the Official Gazette and such notification shall state at what place and time the scheme will be open to inspection of the public."

Section 19 is the other important section. It is as follows :—

> " 19. (1) On and after the day on which the scheme comes into force, the responsible authority may make a provisional order requiring an owner (*a*) to remove, pull down, or alter any building or other work in the area included in the scheme which is such as to contravene the scheme, or in the erection or carrying out of which any provision of the scheme has not been complied with : or
>
> (*b*) to execute within a specified period any work which it is the owner's duty to execute under the scheme, where the responsible authority is of opinion that delay in the execution of the work would prejudice the efficient operation of the scheme.
>
> (2) The responsible authority shall serve a copy of the provisional order made under sub-section (1) on the owner, together with a notice requiring him to show cause, within a reasonable time to be specified in such notice, why the order should not be confirmed.
>
> (3) If the owner fails to show cause to the satisfaction of the responsible authority, the responsible authority may confirm the order granting such further period as it may deem fit, to execute the work and such order shall be communicated to and be binding on the owner and may be enforced. The expenses of enforcement may be recovered in the prescribed manner. An appeal shall lie to the Provincial Government against the order of the responsible authority and their decision shall be final."

Section 20 provides for a claim to compensation by any person whose property is injuriously affected by the making of a town planning scheme. Section 23 confers on the Municipal Council power to levy betterment contribution from owners of property, the value of which had increased or is likely to increase by the making of any town planning scheme. This appeal does not relate to betterment contribution which is the subject-matter of sections 24 to 26. Chapter VII of the Act relates to the acquisition of immovable property required for the purposes of a town planning scheme. Such property shall be deemed to be land needed for a public purpose, within the meaning of the Land Acquisition Act, and may be acquired under the Land Acquisition Act, or under it as modified in the manner specially provided in that Chapter. Section 34 to which reference was made in the course of the arguments runs thus :—

"In cases falling under clause (*b*) of section 33, a notification under section 14 shall, notwithstanding anything contained in the Land Acquisition Act, 1894, operate in respect of any land for the purposes of the scheme as a declaration under section 6 of the said Act, and no further declaration shall be necessary, but it shall not be incumbent on the Provincial Government, or officer authorised in that behalf, to take immediate steps for the acquisition of such land. Provided that if the land is not acquired within three years from the date of the notification, it shall cease to have effect as declaration under section 6 of the Land Acquisition Act, 1894."

Section 36 which occurs in the Miscellaneous Chapter VIII confers power on a Municipal Council to make any agreement with any person in respect of any matter which has to be provided for in a town planning scheme. Section 44 confers power on the Provincial Government to make rules, either generally or for any particular area, to carry out all the purposes of the Act. These rules may be incorporated in any scheme subject to modifications, if any. The rules are in respect of matters like (*a*) the manner of publication of the modifications under section 10, and of the draft scheme under section 11, (*d*) what streets or roads and improvements thereto provided in a town planning scheme shall be made or carried out at the expense of the Municipal Council, the owners of the property or both ; (*k*) the procedure to be observed by Muncipal Council and responsible authority in cases where the owners commit default, or delay in the carrying out of works or improvements for carrying out such works or improvements and for rcovering the cost from the owners liable therefor.

It is not necessary to refer in any detail to the rules made under the Act. The following rules, however, were referred to by counsel, namely, rule 36, which says that a Municipal Council shall convene meetings of owners of lands and buildings in the area affected by the proposed scheme, at which the proposed scheme shall be described and explained and which provides for the taking of written agreements from the owners individually and collectively with respect to their co-operation with the Council by the surrender of land for roads and public purposes, reconstitution of boundaries, betterment levy, compensation or other provisions of the scheme affecting them individually or collectively. Rules 70 and 71 are in respect of the recovery of the expenses of enforcement of orders made under section 19 (3) of the Act.

Clause 7 (3) of the scheme refers to sections 215 and 216 of the City Municipal Act. As one part of the argument of the learned counsel for the respondent, which found acceptance with the learned trial Judge, is based on the provisions of these sections, it is useful to extract them.

They run as follows :—

"215. If the owner of any land utilizes, sells, leases or otherwise disposes of such land or any portion or portions of the same as sites for the construction of buildings, he shall, save in such cases as the site or sites may abut on an existing public or private street, lay down and make a street or streets or road or roads giving access to the site or sites and connecting with an existing public or private street.

216. (1) Any person intending to lay out or make a new private street must send to the Commissioner a written application with plans and sections showing the following particulars, namely :

(*a*) The intended level, direction and width of the street.

(*b*) the street alignment and the building line, and

(*c*) the arrangements to be made for levelling, paving, metalling, flagging, channelling, sewering, drainage, conserving and lighting the street.

(2) The provisions of this Act and of any rules or bylaws made under it as to the level and width of public streets and the height of buildings abutting thereon shall apply also in the case of streets referred to in sub-section (1) ; and all the particulars referred to in that sub-section shall be subject to approval by the Standing Committee.

(3) Within sixty days after the receipt of any application made under sub-section (1) the Standing Committee shall either sanction the making of the street on such conditions as it may think fit or disallow it, or ask for further information with respect to it.

(4) Such sanction may be refused :

(i) if the proposed street would conflict with any arrangements which have been made or which are in the opinion of the Standing Committee likely to be made, for carrying out any general scheme of street improvement.

(ii) if the proposed street does not conform to the provisions of the Act, rules and by laws referred to in sub-section (2), or

(iii) if the proposed street is not designed so as to connect at one end with a street which is already open.

(5) No person shall lay out or make any new private street without or otherwise than in conformity with the orders of the Standing Committee. If further information is asked for, no steps shall be taken to lay out or make the street until orders have been passed upon receipt of such information. Provided that the passing of such orders shall not in any case be delayed for more than sixty days after the Standing Committee has received all the information which it considers necessary to enable it to deal finally with the said application."

At the outset, we may mention that Mr. Narasimha Ayyar, learned counsel for the respondent, attacked the validity of the scheme itself. It is true that issue 2 does cover this contention. But the learned trial Judge expressly refrained from answering that issue. The entire judgment of the learned Judge proceeded on the assumption that the scheme as such was valid, binding and enforceable against the plaintiff. We shall therefore, deal only with those contentions which relate to issue 1 and on the same assumption. If we followed Mr. Narasimha Ayyar correctly, his contention was that if the street DD was a private street, the respondent cannot be compelled to construct any portion of it at his own costs, unless he himself applied under section 216 of the City Municipal Act. In the alternative, he contended that if it was treated as a public street, then it was incumbent on the responsible authority to first acquire the land on which the street was proposed to be laid before further steps could be taken to compel the respondent to construct it. The reasoning of the learned trial Judge also proceeds on this alternative basis of considering DD as a public or a private street. Ther is no definition of a public street or a private street in the Town Planning Act. But there are definitions in the City Municipal Act. " Private street " means any street, road, square, Court, alley, passage or riding path which is not a ' public street ' but does not include a pathway made by the owner of premises on his own land to secure access to or the convenient use of such premises. Section 3 (19). The definition of ' Public street ' in so far as it is material for this case is follows :—

" 3 (20) ' Public street' means any street, road, square, Court, alley, passage or riding path over which the public have right of way whether a thoroughfare or not."

The learned Judge, after an elaborate discussion, was unable to escape the conclusion that the scheme did not either expressly or by necessary implication classify DD either as a public or as a private street. We are unable to see how a determination of the nature of the street has any bearing on the question which falls for decision, namely, whether the responsible authority was entitled to make the order against the plaintiff under section 19 of the Town Planning Act. Once the scheme as such is found or assumed to be valid, we think the question can be easily answered. Section 14 (6) of the Town Planning Act says that a notification published under sub-section (5) of that section shall be conclusive evidence that the scheme has been duly made and sanctioned. From the date of such notification all owners of lands and buildings in the area affected by the scheme will be under an obligation to comply with the provisions of the scheme. Under the scheme with which we are concerned in this appeal, it is the duty of the respondent as owner of Survey No. 537 to execute work of constructing that part of the street DD which runs through his land. Under section 19 (1) of the said Act, the responsbile authority has got the power to make a provisional order requiring the respondent as such owner to execute the work which it is his duty to execute under the scheme. Under section 19 (3) if the owner fails to show cause to the satisfaction of the responsible authority, the authority may confirm the order. Rule 70 provides that where any owner commits default or delays the carrying out of any work ordered by the responsible authority under sub-section (3) of section 19, the responsible authority may authorize the Commissioner of the Corporation of Madras to cause such work to be executed and recover the expenses incurred thereby from the owner. All that has happened in this case appears *prima facie* to be strictly in accordance with the provisions of the scheme of the Act and the rules framed thereunder.

The question whether a street is public street or a private street may become material when rights are asserted by the general public over it, when the liability to maintain it arises, and in other circumstances, none of which is involved at this stage. A "street" in its ordinary popular sense means a road way, not necessarily a highway which has on one side or both sides a more or less continuous and regular row of houses." (*Vide* Halsbury's Laws of England, second edition, volume XVI, page 192). Though popularly a road without any houses on either side would not be a street, yet in a vast city like Madras, there are bound to be several such roads within municipal limits, and they too should be regarded as streets for purposes of municipal administration. Vide *Provident Investment Co.* v. *Emperor*[1]. Jessell, M. R., in *Taylor* v. *Corporation of Oldham*[2], observed as follows :—

> "The definition of a street is thus laid down in the Imperial Dictionary. The street itself is no doubt properly the paved or prepared road ; that is the street. It sometimes includes houses along each side of it. But that is not its proper meaning. It is called a street even without houses. There are some streets with no houses."

There may be streets over which the public at large have no obstructed right of passage. But at the same time certain members of the public, namely, residents of the houses abutting that street, may have a right of passage over it to have access to a public street. Likewise, persons who desire to have access to such building abutting the street may also have a right to use it. Even in respect of what are deemed to be private streets, the municipal authorities have considerable powers. Under section 218, if any private street or part thereof is not, for instance, levelled paved, metalled, drained, or conserved to the satisfaction of the Commissioner, he may by notice require the owners of such street or path, and the owners of buildings and lands fronting or abutting on such street or path, to carry out any work which in his opinion may be necessary and if such work is not carried out within a specified time the Commissioner may execute it himself. The scheme only mentions, streets, some of which have to be constructed by the responsible authority and some to be constructed by the owners. In addition to these streets, which are an integral and essential part of the scheme, there is also provision in the scheme for other private streets (clauses (7), (4) and (5)).

We fail to see how any question of acquisition of the land on which the street DD is to run arises in this case. If the land is acquired, then the street vests in the Municipal Council. Otherwise, the ownership of the street, vests in the respective owners of the land over which the street runs. The appellant does not claim ownership in that part of the street DD which runs through the plaintiff's property. The fact that the Municipal authorities can compel an owner to do something on his own land in the interests of public health or safety does not mean that there is any transfer of ownership of the concerned land to the Municipality. Take, for instance, the compulsory construction of a private drain under section 179 for a group or block of premises. The Commissioner can himself contruct a drain and collect the expenses of the construction from the owners of the several premises. The drain, however remains the joint property of the several owners. In the same manner, a private owner may be compelled to lay a street on a portion of his land, and nevertheless continue to remain the owner of the site of such street.

The reference to sections 215 and 216 of the City Municipal Act in clause 7 (3) of the scheme is sought to be made use of by the appellant's counsel to found an argument that unless the private owner, that is, the respondent himself, applies under section 216, he is not obliged to construct any portion of the street DD. As the respondent has not made any such application, it is contended that he is under no obligation to construct it. In our opinion, the entire argument is fallacious. The reference to sections 215 and 216 is obviously confined to the procedural part of the sections. Otherwise, the provisions in the scheme become meaningless. Section 215 cannot literally apply to the carrying out of the Town Planning Scheme sanctioned by the Government. When the scheme as set out in the plan comprises the laying of new streets, there can be no question of any person

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[1] A.I.R. 1943 Bom. 435.

[2] 46 L.J. Ch. 105 at 109.

"intending to lay out or make" a new street, within the meaning of section 216 of the City Municipal Act. The scheme lays down that certain streets shall be constructed either by the Responsible authority or the owners on the lines shown in the maps attached to the scheme. Once the scheme has been published and it is otherwise valid, the provisions of the scheme are enforceable against the owners of lands and buildings within the area covered by the scheme. It is not then open to any of the private owners to say that a particular road is not necessary or that it should run in any way different from the way shown in the plan. The reference to sections 215 and 216 of the Municipal Act in clause 7 (3) of the scheme must be read with reference to the context and it should not be overlooked that the reference itself is "subject to the provisions of the scheme."

With respect to the learned trial Judge, we are unable to agree with him that the obligations to form that portion of DD as lay in the plaintiff's survey No. 537 could arise only if there was an application from the plaintiff under section 216 of the City Municipal Act. We also unable to agree with him that on the assumption that DD was intended to be a public street, the plaintiff respondent would have a right to resist the enforcement of the order under section 19 (3) of the Act till the title to the land on which the road DD has to be constructed vests in the responsible authority. We hold that the answer to the first issue should be in the affirmative.

This of course is on the assumption that the scheme itself is valid and enforceable against the plaintiff. Mr. Narasimha Ayyar, learned counsel for the respondent, however, contends that the scheme itself is invalid and not enforceable against the plaintiff. This is covered by issue 2. But the learned trial Judge expressly refrained from dealing with it because of his finding on issue 1 the plaintiff was bound to succeed. As we have differed from the learned Judge on issue 1, a determination of issue 2 becomes necessary. In the interests of a speedy disposal of the case, we think the best course would be to remit the case to the trial Judge for a finding on issue 2. The parties will be at liberty to adduce such additional oral and documentary evidence as they choose to.

[After the return of the finding the Court delivered the following Judgment]:

The Judgment of the Court was delivered by

P. V. Rajamannar, C.J.—On 9th October, 1953, we remitted the case to the learned trial Judge for a finding on issue 2. That issue runs as follows :—

> "Is the Nungambakkam North Area Town Planning Scheme binding on and enforceable against the plaintiff ?"

The parties were given the opportunity to adduce such additional, oral and documentary evidence as they chose to. Panchapakesa Ayyar, J., accordingly dealt with this issue and has returned the following finding, namely, that the Scheme is binding and enforceable against the plaintiff, on condition of his being paid reasonable compensation for the deprivation of his exclusive right and enjoyment of the land up to a length of 940 feet and the Corporation bearing the entire cost of constructing the road on the land. This finding of the learned Judge was based on Articles 13, 19 and 31 (2) of the Constitution. Dr. John counsel for the Appellant, namely, the responsible authority under the scheme, attacked the finding on the ground that the Constitution would not apply to the case, as the scheme was framed under an Act passed long before the Constitution came into force. He further relied on the fact that the scheme was also framed long before the Constitution, and rights and liabilities had accrued before the Constitution came into force. Mr. Narasimha Ayyar learned counsel for the Respondent, sought to support the finding of the learned Judge not only on the provisions of the Constitution but also the provisions of section 299 of the Government of India Act, 1935. He also contended that even apart from the provisions of the Constitution and the provisions of the Government of India Act of 1935 the scheme contravened the principle of Common Law that no person could be deprived of property without just compensation. In addition to these constitutional objection, Mr. Narasimha Ayyar also put forward the plea that the scheme in any event in so far as it affected him did not fulfil the requirements of rule 36 of the Rules framed under the Act.

In dealing with the several questions raised before us, it is necessary to make a distinction between an attack on the Act itself under which the scheme was framed and an attack on the scheme as such. Though the issue in terms refers to the scheme, it would certainly be open to the respondent to contend that the Act itself is invalid and therefore any scheme framed under the provisions of that Act would be consequently invalid. So far as we were able to gather, Mr. Narasimha Ayyar has not seriously contended that the Act itself was *ultra vires* the Legislature or that it was void because it contravened any express legislative provision. Indeed, he could not. The Act was passed in 1920, and sub-section (4) of section 299, the only provision of the Government of India Act on which reliance was placed expressly declares :—

> "Nothing in this section shall affect the provisions of any law in force on the date of the passing of this Act ".

Likewise, Article 31 (5) (*a*) declares that nothing in clause (2) shall affect the provisions of any existing law other than a law to which the provisions of clause (6) applies, and obviously clause (6) has no application to the Act in question. It became clear during the course of Mr. Narasimha Ayyar's arguments that his objection was really to the provision in the scheme which made it obligatory on him to construct the road DD at his own expense. Mr. Narshimha Ayyar did not seriously contend that this provision could in any way be affected by section 299 (2) of the Government of India Act, 1935, which prohibits a Federal or Provincial Legislature to make any law, that is, statute, authorising the compulsory acquisition for public purposes of any land unless the law provided for payment of compensation for the property acquired. The scheme as such cannot be deemed to be a law made by the Provincial Legislature.

Mr. Narasimha Ayyar relied very strongly on Article 13(1) of the Constitution. It runs thus :

> " All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency be void."

Law is defined as including any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The only way in which Mr. Narasimha Ayyar can seek the aid of Article 13(1) is to treat the notification of the Government sanctioning the Scheme as a law within the meaning of Article 13(1) and to contend that it is inconsistent with Article 31 (2) which prohibits property being taken possession of or acquired for public purposes, unless the law provides compensation for the property taken possession of or acquired. It this be so, then he is met with what appears to us to be an insuperable difficulty in his way on account of the express provision contained in Article 31 (5) (*a*) because the scheme would be an existing law.

There is also another aspect of the matter, which conclusively prevents Mr. Narasimha Ayyar from taking advantage of the Constitution.

Not only was the scheme framed long before the date of coming into force of the Constitution; the liability under the scheme also accrued long before that date and the responsible authority had taken steps to enforce that liability by the issue of a notice under section 19(1) of the Act long before that date. In fact, the suit itself was instituted in 1949, that is, before the Constitution. In such circumstances, the Constitution will not avail the Respondent. The principle is thus enunciated by Das, J., in *Keshavan Madhava Menon* v. *The State of Bombay*[1].

> "As already explained, Article 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect. . . . . So far as the past acts are concerned the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights."

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[1] (1951) 1 M.L.J. 370 at 373: (1951) S.C.J. 182 : (1951) S.C.R. 228 (S.C.).

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Mukerjea, J., as he then was, in *Qasim Razvi* v. *State of Hyderabad*[1], affirmed this principle thus :

> " . . . . as has been held by this Court in *Keshavan Madhava Menon* v. *State of Bombay*[2], the effect of Article 13(1) of the Constitution is not to obliterate the entire operation of the inconsistent laws or to wipe them out altogether from the statute book; for to do so will be to give them retrospective effect which they do not possess. Such laws must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution."

Mr. Narasimha Ayyar's argument that apart from the Constitution and the Government of India Act of 1935 there is a Common Law Rule that no one could be deprived of property without just compensation does not call for serious consideration. Learned counsel confessed that he was unable to cite any authority in support of his argument. It is well known that before the present Constitution there was no rule, either statutory or at Common Law, to that effect.

The conception of private property is itself dependent upon and bound up with law. Cooley in his Constitutional Law says :

> " That is property which is recognised as such by the law and nothing else is or can be".

and quotes from Bentham's Theory of Legislation the following passage in support :—

> " Property and law are born and must die together. Before the laws thare was no property o take away the laws and property ceases. No doubt, the Common Law of England would seem ty recognise the right of private property as one of the three absolute rights inherent in ever t Englishman. This right of property, according to Blackstone consists in "the free use, enjoymen and disposal of all his acquisitions, without any control or diminution save only by the laws of the land ".

So it follows as a logicial corollary that the laws of the land can control or diminish such right of property. In England, Parliament is supreme. The validity of an Act of Parliment cannot be questioned by the Court, therefore, on the ground that it diminished or destroys private property. The unlimited scope of the legal power of Parliament is described by Dicey as the power to make or unmake any law whatever within the limits of physical possibility. (*Vide* Halsbury (Hailsham's Edition) Vol. VI, pp. 383 and 390). That is why the subject cannot possess guaranteed rights in England, such as are guaranteed to the citizen by many foreign Constitutions. So far as British India was concerned, its Legislatures, though not sovereign, in the sense that Parliament is sovereign, were within the limits of their powers and jurisdiction, omnipotent. The Legislatures had plenary powers of legislation acting within the limits, as large and of the same nature as those of Parliament itself : *The Queen* v. *Burah*[3]. Dealing with Colonial Legislatures, which were analogous to the Indian Legislatures under the Government of India Act, Clement in his book on Canadian Constitution (3rd Edition) at page 358 says that an Act passed by any Canadian Legislature within the power conferred by the British North America Act would not be invalid, even if it imposed taxation without regard to uniformity or equality, or even if one man's property was taken from him and given to another without compensation. Before the Government of India Act, 1935, there was no provision similar to section 299 of that Act in the earlier Government of India Acts. It is only the present Constitution that in terms confers fundamental rights on citizens including the right to acquire, hold and dispose of property. It is therefore, clear that the Town Planning Act, passed in 1920 cannot be impugned on the ground that it deprives a citizen of his property without payment of compensation.

We also see no substance in the contention based on rule 36. That rule relates to the procedure to be followed before the scheme is even placed before the Council of the Corporation. Under that rule, the Municipal Council has to convene meetings of owners of lands and buildings in the area affected by the proposed scheme. It is now found that the Respondent did attend one such meeting. At such meetings, the proposed scheme has to be generally described and explained. Rule 36 (6) provides :

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[1] 1953 S.C.J. 151 : (1953) S.C.R. 589 : A.I.R. (1953) S.C. 156 (S.C.).

[2] (1951) 1 M.L.J. 370 : 1951 S.C.J. 182 : 1951 S.C.R. 228 (S.C.).

[3] (1878) L.R. 3 A.C. 889 at 904.

"At the meetings or at such other times as may be convenient, written agreements shall be taken from the owners individually and collectively with respect to their co-operation with the council by the surrender of land for roads and public purposes, reconstitution of boundaries, betterment levy, compensation or other provisions of the scheme affecting them individually or collectively. The necessary stamp fee on such agreements shall be borne by the municipal council."

The contention of Mr. Narasimha Ayyar is that no written agreement was taken from the Respondent, such as is contemplated by rule 36 (6) and therefore the scheme does not bind the Respondent, in so far as it affects him. The fact that written agreements are contemplated to be taken from the owners " with respect to their co-operation " with the council does not lead to the conclusion that in the absence of such agreements the scheme is invalid. Section 14 (5) and (6) are in the following terms :—

"(5) The sanction of the Provincial Government to a scheme under sub-section (3) shall be published by notification in the Official Gazette and such notification shall state at what place and time the scheme will be open to the inspection of the public.

(6) A notification published under sub-section (5) shall be conclusive evidence that the scheme has been duly made and sanctioned. The scheme shall have effect from the date of publication of such notification and the execution of the scheme shall be commenced forthwith.

Provided that, where the scheme so provides, the execution of the scheme or any part thereof may be deferred until such time as may be fixed in the scheme."

It is not disputed that a notification was published under sub-section (5). After such a notification it will not be open to anyone to say that the scheme has not been duly made. Section 19 provides that on and after the day on which the scheme comes into force, the responsible authority may make an order requiring an owner to execute within a specified period any work which it is the owner's duty to execute under the scheme, where the responsible authority is of opinion that delay in the execution of the work would prejudice the efficient operation of the scheme. We see therefore nothing in this objection of the Respondent.

It follows from what we have held above that the finding of the learned trial Judge cannot be accepted. Our finding on issue 2 is that the scheme is binding and enforceable against the plaintiff.

On this finding and the findings arrived at by us before remand the suit must be, and it is hereby, dismissed. No costs in the trial Court. The appellant will get the costs of the appeal from the respondent.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAMASWAMI.

T.M.R. Abdul Khader .. *Appellant**

Constitution of India (1950), *Article* 311—*Scope of.*

A mere suspension of a civil servant for a specified period from service would not fall within Article 311 (2) of the Constitution of India. A mere suspension does not involve necessarily a reduction in rank.

Provincial Government, C.P. and Berar v. *Shamsul Hussain*, A.I.R. 1949 Nag. 118, differed.

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Rajagopalan, dated 17th July, 1956 and made in exercise of the Special Original Jurisdiction of the High Court in W.P. No. 802 of 1956 presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order of the Revenue Divisional Officer, Salem, dated 27th September, 1955, in R.O.C. No. 3014/55 (F) and the proceedings of the Collector of Salem, dated 1st February, 1956, in R.O.C. No. 31990/55/A 6 and the proceedings of the Government of Madras, dated 29th June, 1956, in its Memo. No. 19784-N 156-3 (Revenue) and to quash the order of suspension against the petitioner.

N. Panchapakesa Iyer and *K. Narayanaswami Mudaliar* for Petitioner.

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*W.P. No. 106 of 1956. 5th September, 1956.

The Judgment of the Court was delivered by

Rajamannar, C.J.—There is no substance in this appeal.

The first point urged by the appellant's learned counsel was that there was no reasonable opportunity afforded to him, after he had been served with a "show cause" notice and the provisions of Article 311 of the Constitution were therefore infringed. The appellant was only suspended from service for one year. We agree with the learned Judge, Rajagopalan, J., against whose order this appeal is preferred that a mere suspension would not fall within Article 311 (2) of the Constitution. The decision of the Nagpur High Court in *Provincial Government, C.P. & Berar* v. *Shamsul Hussain*[1], was relied upon in which it is observed that a mere suspension may amount to reduction in rank. With great respect to the learned Judge, we do not agree with this interpretation. A mere suspension does not involve necessarily a reduction in rank.

The next point taken is that the appellant was not given an opportunity of establishing his defence. There was no complaint made before the Collector, or the Board, that the appellant was not given an opportunity to lead evidence which he wanted to in support of his case. We also agree with the learned Judge that it is difficult to understand what further oral enquiry could have been sought. The observations of the learned Chief Justice in *State of Bombay* v. *Gajanan Mahadev*[2], do not have any bearing. All that the learned Chief Justice said was that it was for the State to show that the officer who has been punished had a sufficient opportunity to defend himself. In the present case we are quite satisfied that the appellant has had such an opportunity.

Connected with this point, another new point was taken that there should have been two stages of enquiry. We see no foundation in support of that contention.

Lastly it was said that mere detention of money for a period of about two months would not amount to a temporary misappropriation in all cases. It is quite true that if the detention could be satisfactorily explained, there would be no question of misappropriation. Indeed, the appellant did attempt an explanation; but that explanation was not accepted by the Revenue Divisional Officer and it it not open to us to canvass his decision.

The appeal is therefore dismissed.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

S. Kannappa Nayanar .. *Petitioner**

v.

Varadaraja Pandithan .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (*a*)—*Scope of.*

When all that is proved is that a landlord-petitioner had only a permissible user of another non-residential premises during night time and that he was carrying on his business on the payement during day-time it would not amount to a possession or occupation of a non-residential building in his own right for the purposes of his business so as to disentitle him from applying for possession of a non-residential building of his own.

Thanappa Chetti v. *Govindaswami Naicker,* (1952) 1 M.L.J. 248, explained.

Petition under section 12-B of the Madras Act VIII of 1951 praying the High Court to revise the order of the Court of the Small Causes at Madras, dated 11th September, 1953 and made in H.R.A. No. 497 of 1952 preferred against the order of the Rent Controller at Madras, dated 13th November, 1952 and made in L.Dis. No. 3607/H.R.C./1952.

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[1] A.I.R. 1949 Nag. 118.

[2] A.I.R. 1954 Bom. 351, 355.

*C.R.P. No. 148 of 1954. 31st July, 1956.

R. Thirumalai Thathachari for Petitioner.

O. Radhakrishnan and *W. S. Venkataramanujulu* for Respondents.

The Court delivered the following

JUDGMENT.—This petition arises against the orders of the Appellate Tribunal in rent control proceedings confirming the order of the Rent Controller refusing to order eviction of the respondent.

The petitioner was once occupying one of the two shops now in the possession and occupation of P.W. 2. P.W. 2 was his landlord for some time and afterwards P.W. 2 wanted to expand his own business and therefore got possession of the shop in which the petitioner was carrying on his business. After P.W. 2 took possession of the shop in which the petitioner was carrying on the business, he appears to have permitted the petitioner to keep tailoring machine during the nights and also some of the garments belonging to the customers of P. W. 1, for the sake of safety. With such permission granted P.W. 1 appears to have been carrying on his business on the Corporation pavement opposite to P.W. 2's shop.

The respondent, who is in occupation of the shop in question now from which he is sought to be evicted by the petitioner, was let into possession of the shop by the petitioner. When the petitioner was asked to give up the shop of which he was in possession by P.W. 2 the petitioner in his turn called upon the respondent to vacate the shop in respect of which the respondent was a sub-tenant under the petitioner. On more than one occasion, the respondent agreed to do so, both orally and in writing. But when the petitioner filed the application for evicting the respondent on his failure to keep up his promise, the respondent raised a plea that he was not his tenant and that the petitioner was not entitled to evict him in view of the fact that he was in possession of another shop, where he was carrying on business. The Rent Controller as well as the Appellate Tribunal have both concurred in the view that the respondent was not the tenant of the petitioner and that the petitioner himself was in occupation of another shop and therefore he was not entitled to evict the respondent. The question is how far their decision could be sustained.

I have been taken through the entire evidence both oral and documentary in this case by both learned counsel appearing on opposite sides. I have also been taken through the orders of the two Courts below. On a perusal of the entire evidence and also the orders of the two Courts below I am of the opinion that both the Courts have not considered, the case in its proper perspective. The documentary evidence let in on behalf of the petitioner proves beyond any doubt that the respondent was a tenant under the petitioner and the plea, which he has set up, is wholly an after-thought and unacceptable. The exhibits filed on behalf of the petitioner, which are all in the writing of the respondent, are good and sufficient evidence to establish the fact that the relationship between the petitioner and the respondent was of landlord and tenant. Therefore, in my opinion both the Courts have come to the wrong conclusion, that the petitioner did not succeed in establishing that the respondent was his tenant. Payment of rents and also several letters given by the respondent could point to no other conclusion than that he was a tenant under the petitioner.

The second point is as to whether the application of the petitioner was *bona fide* even here. I am of the opinion that the Courts below have not understood or appreciated the real scope of the case. All that the oral evidence establishes is that for some period prior to P.W. 2 taking over possession of the shop the petitioner was in occupation of a shop as tenant under P.W. 2 . But when P.W. 2 established a jewellery shop and expanded his business, the petitioner was compelled to give up his possession of the shop. Since then, the evidence proves beyond any doubt that he has gone on with a shop of his own or a shop to which he is entitled to possession. The only shop to which he could lay claim was the one that was in the occupation of the respondent. In consequence of his having been compelled to give up possession of the other shop by P.W. 2 naturally the petitioner has turned towards his tenant to vacate and give possession of the shop to which he was entitled. The evidence of all the witnesses for the petitioner, notwithstanding the fact that there has been cross-examination , only points to the fact that the petitioner during the period when he was insisting upon the respondent to vacate the shop had nothing but permissive use of P.W. 2's shop in order to keep his tailoring machine and also his garments during nights and that he was carrying on his businesses throughout the day on the pavement belonging to the Corporation. The evidence let in on behalf of the respondent is absolutely unworthy of credence and it does not prove by any means that the petitioner had a shop of his own or that he shared the shop of P.W. 2. A mere permission granted to the petitioner to keep his machine during the nights and also his garments would not amount to a possession or occupation of his shop in his own independent right by the petitioner nor could it amount to a sharing of the shop belonging to P.W. 2 so as to invoke the provisions of the Madras Buildings (Lease and Rent Control) Act against the petitioners.

The Courts below have misunderstood and misapplied the scope of the decision of Subba Rao, J., in *Thanappa Chetti* v. *Govindaswami Naicker*[1]. Unless and until it has been established that the petitioner was actually in a non-residential premises of his own or that he was entitled to possession of a non-residential premises which was available to him for his business which he was carrying at the time, the ruling in the decision could not be made applicable. In this case it has not been established that the petitioner was in possession or was entitled to possession of any shop. In these circumstances the decisions of the Courts below amount to a failure of justice in the case. They have both to be set aside. The petitioner will be entitled to an order for eviction of the respondent from the shop which the respondent is now in occupation. This Civil Revision Petition is therefore allowed ; but in the circumstances, I do not think I need order costs. Time of delivery of possession three months from this date.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The North Arcot District Central Co-operative Stores Ltd.,
Vellore, by its Secretary T.P. Loganathan Chettiar .. *Petitioner**

v.

The State Government of Madras represented by the Collector of North Arcot, Vellore. .. *Respondent.*

Court-fees Act (VII of 1870), section 17, as amended in Madras—Four separate orders placed by the Collector for the supply of goods to four districts—Distinct subjects—Suit in respect of—Whether section 17 of the Act applies.

In the absence of a parent contract with the Collector forming a basis for a common cause of action for the claim in respect of four separate orders placed by the Collector with the plaintiff for the supply of wheat to four different districts. Section 17 of the Court-Fees Act would apply as there are four district subjects and four distinct causes of action. The fact that there was only one notice under section 80, Civil Procedure Code, given will not show that there was only one transaction.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Vellore, dated 27th January, 1955 and made in unregistered plaint R.R. No. 173, dated 6th January, 1955 and 20th January, 1955 (now registered as O.S. No. 12 of 1955).

V. M. Ramaswami Mudaliar for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Court delivered the following

JUDGMENT.—I have perused the entire records and heard the learned counsel for the petitioners and the learned Government Pleader, and see no reason to interfere in the circumstances proved. Though Mr. Ramaswami Mudaliar, learned counsel for the petitioners alleged that the *four separate orders*, placed by the Collector of North Arcot with the petitioners for supply of wheat to Cuddapah, Chittoor, Bellary and Anantapur, were in pursuance of one and the same parent contract and formed part of the same transaction, and therefore would not fall within the mischief of section 17 of the Court Fees Act, he was unable to show the parent contract entered into with the Collector of North Arcot by the petitioners under which they agreed to supply wheat to Cuddapah, Chittor, Bellary, Anatapur and any other place indicated by him from time to time. As the learned Government Pleader pointed out, there was no reference in the plaint to any such parent contract. So we are left with the fact that there were only four separate and distinct proceedings of the Collector for the supply to the four districts concerned ; if so, each of them would be a distinct subject, being a distinct transaction, with a distinct cause of action. though the contracting parties were the same. If that is so, the Full Bench ruling In re. *Lakshminarayana Chettiar*[1], will not help the petitioners as urged by Mr. V.M.R.. Mudaliar. It was held in that ruling that distinct subjects in section 17 of the Court Fees Act mean distinct causes of action in respect of which separate suits should be filed but for the enabling provisions allowing them to be clubbed up in one suit, and that the distinctness or identity of the cause of action is the only criterion for the applicability of the section. In the absence of a parent contract with the Collector, forming a basis for a common cause of action for the claim in all these four cases, section 17 of the Court Fees Act will apply, as there are four distinct subjects,. and four different causes of action. The fact that only one notice under section 80, Civil Procedure Code, was given will not show that there was only one transaction. Sometimes any number of claims against a person (here the Government) may be consolidated in one notice, where only one suit is intended to be filed as here. It may be noticed that, even when appointing 10 clerks in an office newly started 10 orders are not always issued, but often only one order including them all. For all the above reasons, the lower Court's order is correct and is upheld. Two months time from today is given to the petitioners for paying the deficit-court-fee. This Civil Revision Petition deserves to be and is hereby dismissed, but, in the peculiar circumstances, without costs.

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[1] (1952) 1 M.L.J. 248.

* C.R.P. No. 767 of 1955. 10th August, 1956.

V. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Kunnappath Kallitan Kannan Nambiar and another .. *Appellants**

v.

Kunnappath Kallitan Krishnan Nambiar and others. .. *Respondents.*

Civil Procedure Code (*V of* 1908), *sections* 144 *and* 151—*Scope*—Bona fide *third party purchaser in pursuance of the decree—Without notice of any defect in the decree—If affected by declaration that decree was obtained by fraud.*

It is well established that a *bona fide* third party purhaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy of restitution does not lie against him.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A.S. No. 242 of 1953, preferred against the decree of the Court of the District Munsif of Tellicherry in O.S. No. 687 of 1948.

V. P. Gopalan Nambiar for Appellants.

K. P. Ramakrishna Ayyar for Respondents.

The Court delivered the following

JUDGMENT.—The short point for determination in this second appeal is whether consequent on the declaration that the decree in pursuance of which the sale has taken place has been obtained by fraud, the purchase by a third party, who is the third defendant in this case and who has been found to be a *bona fide* purchaser without notice of any defect in the decree, would be affected. It is well established that a *bona fide* purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy by way of restitution does not lie against him. The learned counsel for the appellant however argues relying on the decision in *Karuppanna Goundan* v. *Ponnuthayee*[1], and *Radha Bai* v. *Jagannadha Naidu*[2], that the sale may be vitiated on occount of the fraud of the third party purchaser and that since the first defendant's representative character as karnavan has been decided against in the earlier proceedings, the third defendant's purchase in pursuance of the decree in favour of the second defendant is also vitiated. The decisions referred to deal with questions relating to the validity of Courts sales. The Bench decision in *Karuppanna Goundan* v. *Ponnuthayee*[1], dealt with an application under Order 21, rule 90, Civil Procedure Code. Similarly in *Radha Bai* v. *Jagannadha Naidu*[2], the circumstances under which a sale could be set aside are clearly mentioned and the learned Judge observed that the rule that a *bona fide* purchaser at a sale in pursuance of a decree which is subsequently reversed is not affected by the reversal is subject to this condition that it would not apply to cases where through a mistake or material irregularity of the Court the property has been sold such as when one property has been attached and another has been sold or where as in this case the property was sold on one date whereas it ought to have been sold on another date. Here again the question turned upon the validity of the sale proceedings by reason of the identical property which was attached not being sold and the date of the actual sale and the date in the sale proclamation varying. This again refers to proceedings for setting aside a sale for material irregularity under Order 21, rule 90, Civil Procedure Code and as such these decisions have no bearing on the present case where the sale has not been attacked but the contention is that by reason of the fact that the decree in pursuance of which the sale is effected has been declared to be fraudulent the sale in pursuance thereof also becomes invalid. So the decisions have no bearing on the question at issue. The view taken by the lower appellate Court is correct and the second appeal is dismissed with costs.

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[1] (1954) 1 M.L.J. 403 (F.B.).

* S.A. No. 2153 of 1953. 13th July, 1956.

No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

K. V. Rengachari .. *Petitioner**

v.

Somasundaram Pillai .. *Respondent.*

Court-fees Act (VII of 1870)—Suit to set aside—Decree for redemption of a mortgage in toto*—Court-fe payable.*

Where the entire decree for redemption of a mortgage is sought to be set aside *in toto* the proper Court-fee payable would be on the principal money expressed to be secured by the instrument of mortgage.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of West Tanjore at Tanjore, dated 4th September, 1954 and made in A.S. No. 73 of 1953 (O.S. No. 1 of 1949, Sub-Court, Tanjore).

P. S. Raghavarama Sastri for Petitioner.

R. Gopalaswami Ayyangar for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by one Rengachari for revising and setting aside the order of the District Judge, West Tanjore, in Appeal Suit No. 73 of 1953 filed by him, directing him to pay Court-fee on the entire amount of the principal money expressed to be secured by the instrument of mortgage, and not merely on the market value of the one-fourth of the mortgaged properties which he claimed for himself as not redeemable.

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[1] (1956) 1 M.L.J. 190.

[2] A.I.R. 1937 Mad. 694.

* C.R.P. No. 1385 of 1954. 24th August, 1956.

I have perused the entire records and heard the learned counsel on both sides. I have no doubt that, on the facts of this case, where the plaintiff has got a decree for redemption of all the mortgaged properties, including the properties claimed by the petitioner, and the petitioner is attacking the entire decree and wants the entire decree to be set aside *in toto* and the suit dismissed, the proper Court fee payable would be certainly on the principal money expressed to be secured by the instrument of mortgage. Reliance was placed by Mr. Raghava Rama Sastri, learned counsel for the petitioner, on the ruling of the Patna High Court in *Ramakant* v. *Kamala Prasad*[1]. But the facts there were different. The correctness of the decree for redemption was not challenged in that case *in toto*. Only the correctness of a portion of it was challenged. But, here, the petitioner challenged the entire redemption decree in favour of the plaintiff, and wanted the suit to be dismissed with costs. So, apart from the question of splitting up the mortgage, the petitioner had to pay the Court-fee on the entire principal amount as he wanted the entire suit to be dismissed, and had not merely attacked the decree with regard to the one-fourth share now claimed by him. One need not wonder why he did so. Sometimes a person claiming one-fourth interest in the mortgaged properties may still want the entire redemption decree to be set aside either out of spite towards the plaintiff or in collusion with the other persons interested who prefer to remain in the background. The appeal has to be valued according to the relief prayed for. As the petitioner wanted the entire suit to be dismissed, and challenged also the correctness of the decree regarding the three-fourths of the mortgaged properties in which he says he has no interest, he was rightly directed to pay the Court-fee on the principal money expressed to be secured by the instrument of mortgage. There is no need therefore to go into the other questions or to discuss whether the Court-fee payable would differ if the petitioner's attack was only regarding the one-fourth. This Civil Revision Petition deserves to be and is hereby dismissed, but, in the circumstances, without costs. Two months time from today given to pay the deficit Court-fee.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

S.A.S. Marimuthu Nadar, Virudhunagar .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Indian Income-tax Act (*XI of* 1922), *section* 2 (6-*AA*) *and section* 16 (3) (*a*) (*ii*)—*Earned income relief in respect of income of minor partners' profits included in the income of father as assessee.*

In the definition of ' earned income ' the expression 'such income' in the concluding clause of section 2 (6-AA) of the Indian Income-tax Act with reference to income chargeable under the head 'profits and gains of business' must obviously refer to the income specified in clause (*b*) of the said section. Earned income relief can therefore be claimed only by the assessee, whose income (his own as well as that which is deemed to be his by a legal fiction under the definition of earned income) is assessed to tax. Income of another person included in an assessee's income by any legal fiction created by the statute will be entitled to earned income relief in the hands of such assessee. The expression ' such income ' has to be construed as income on which the assessee has to be assessed to tax. The conditions laid down by the earlier part of section 2 (6-AA) of the Act which are to be satisfied by an assessee before he could claim the earned income relief should no doubt be satisfied by the assessee. But in cases where other persons' income are included in those of the assessee under the later part of the definition, it is not necessary that such other person should also satisfy the tests. Even if a wife or minor child whose income is treated as the assessee's and taxed as such, does not actually participate in the conduct or management of the business of the firm nontheless if the assessee participated in the management or conduct of the business he would be entitled to earned income relief not only on his own share of the income but also on the amount belonging to the wife or minor child but which is included in his assessable income.

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[1] (1951) I.L.R. 30 Pat. 859.

*Case Referred No. 28 of 1953. 28th August, 1956.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in R.A. Nos. 242 and 971 (Madras) of 1952-53 on its file for decision.

T. V. Viswanatha Ayyar and *S. Narayanaswamy*, for the Applicant.

C. S. Rama Rao Sahib, for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee, Marimuthu Nadar, and his divided sons entered into a partnership on 16th August, 1946. On that date two of the divided sons, Bhaskara and Rajasekhara, were minors, and they were admitted to the benefits of the partnership.

In the assessment year 1949-50, the previous year having ended on 16th August, 1948, the share of Marimuthu in the profits of the partnership came to Rs. 9,812. In computing his assessable total income, the shares of the minors, Bhaskara and Rajasekhara amounting to Rs. 8,124 and Rs. 8,381, were added under the provisions of section 16 (3) (*a*) (ii) of the Act. The assessee, however, was granted earned income relief only on the basis of his individual share Rs. 9,812.

In the assessment year 1950-51, the share of the assessee Marimuthu in the profits of the partnership amounted to Rs. 12,344. Bhaskara had meanwhile become *sui juris*. Under the provisions of section 16 (3) (*a*) (ii) Rajasekhara's share Rs. 10,143 was included in computing the total income of Marimuthu. But the assessee was granted earned income relief only on the basis of his own share, Rs. 12,344.

The assessee's contention, that earned income relief should be calculated also with reference to the share income of his minor sons, was negatived by the departmental authorities. That was confirmed by the Tribunal. A consolidated reference was made for both the assessment years, and the question referred to this Court under section 66 (1) of the Act ran:

> "Whether the assessee is entitled to earned income relief on the share income of the two minor sons for 1949-50 assessment year and on the share income of the one minor son for 1950-51 assessment year included in the computation of the total income of assessee under the provisions of section 16 (3) (*a*) (ii) of the Income-Tax Act."

The liability of the assessee for the inclusion of the income of his minor sons in computing his total income under the provisions of section 16 (3) (*a*) (ii) was never in dispute, though it was found that the capital that was contributed to the partnership on behalf of the two minor sons, Bhaskara and Rajasekhara, belonged to them. The ownership of the share income of Bhaskara and Rajasekhara vested in them, but the incidence of the tax fell on the assessee under section 16 (3) (*a*) (ii). The question at issue, what should be the basis for computing the earned income relief has to be answered with reference to the definition of "earned income" in section 2 (6-AA) of the Income-tax Act. The relevant portion of section 2 (6-AA) runs:

> "Earned income means any income of the assessee who is an individual. . . .
>
> (*b*) which is chargeable under the head "profits and gains of business, profession or vocation" where the business, profession or vocation is carried on by the assessee or, in the case of a firm, where the assessee is a partner actively engaged in the conduct of the business, profession or vocation; . . . . and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act. . . . . . ."

The question referred to us has really to be answered with reference to the scope of "such income" which, though it is the income of another person, is included in the assessee's income under the provisions of this Act.

We are concerned in this case only with the income chargeable under the head "profits and gains of business". It was under that head that the share of each of the partners and each of the minors admitted to the benefits of the partnership fell during the assessment years in question. It was found by the Tribunal that in the relevant years it was the assessee Marimuthu that was in charge of the general management of the partnership business. It was also never in dispute that in the relevant years the minor sons of the assessee did not participate in the conduct of the business of the partnership.

The expression "such income" in the concluding clause of section 2 (6-AA) with reference to income chargeable under the head "profits and gains of business", must obviously refer to the income specified in clause (*b*) of section 2 (6-AA). That one of the tests prescribed by section 2 (6-AA) was that the income must be chargeable under the head "profits and gains of business" was never in dispute. That the business in question was that of the firm, of which the assessee was a partner, and of which he was in general management, was not in dispute either. In the case of a firm, the test prescribed by section 2 (6-AA) (*b*) is that the assessee should be a partner actively engaged in the conduct of the business. That test the assessee obviously satisfied, because the assessee Marimuthu was a partner of the firm and he was actively engaged in the conduct of the business of the firm.

Had section 2 (6-AA) stood by itself, without the concluding portion of section 2 (6-AA), the tests to be satisfied would have been (1) the income must be that of the assessee, (2) that the income should be chargeable to tax under the head profits and gains of business, and (3) in the case of those profits and gains of business having been earned by a firm, the assessee should be a partner actively engaged in the conduct of the business.

Obviously the first of these tests cannot be satisfied, where the income of another person is included in the income of the assessee for purposes of computation of the assessee's total income or of its assessment to tax. Therefore in construing the scope of the expression "such income" in the concluding portion of section 2 (6-AA) the fact that the ownership of income vested in a person other than the assessee becomes irrelevant. The statute itself makes it so. But the other two tests will have to be satisfied before it can be treated as "such income" within the meaning of the last clause of section 2 (6-AA).

The second of the tests was satified in this case even with reference to the share of the firm's profits which accrued to Bhaskara and Rajasekhara. We have already pointed out that that was income which was chargeable to tax under the head profits and gains of business.

What is the scope of the third of the tests we have mentioned above is therefore the question to be answered. In our opinion the answer should be that on a plain reading of the statutory provisions of section 2 (6-AA) it is the assessee that should have been actively engaged in the conduct of the business of the firm, of which he as well as the minors, Bhaskara and Rajasekhara, were partners, whatever be the basis of the computation of the assessable income of the assessee Marimuthu. Marimuthu satisfied that test.

In the absence of any reported case, where the question at issue before us was decided, the learned counsel referred to the views of commentators on the Indian Income-Tax Act as part of their respective arguments.

The learned counsel for the assessee referred to the views of the authors, Kanga and Palkhivala, in their book on Income-tax, 3rd edition, at pages 203-4:

> "Under the last para. of this definition, income which is earned by the assessee and included in his total income under the provisions of this Act is his earned income though it may accrue in law to another person. Thus where an assessee's wife is a partner, or his minor child is admitted to the benefits of the partnership, in a firm of which the assessee is a partner, the wife's or child's share of profits is included in the assessee's total income under section 16 (3) and it would be regarded as the assessee's earned income if he is actively engaged in the conduct of the partnership business."

The learned counsel for the Respondent pointed out that in Sampath Ayyangar's Indian Income-Tax Act, Volume 2, 4th edition, page 120, the learned author observed :

> " . . . . . On the language of clause (*c*) under discussion which runs, "and includes any such income which though it is the income of another person", it would appear that the income

of such other person should possess characteristics previously mentioned, one of which is that the income should be derived from personal exertion. From this it would follow that if the wife were merely a dormant partner, her share of the partnership profits would not be earned income, though it might be included in the total income of the husband. To the argument, for proving the contrary, that if the wife were an active partner, her income would be earned income without any more mention, the answer is afforded, that since the wife is not an assessee *quoad* that income, a specific provision was rendered necessary that if her share of the profit were otherwise earned income, it should not cease to be such merely because *she* was not assessed, but her *husband* was. If the husband were also an active partner, both the shares would be earned income. If the husband were a dormant partner, but the wife were an active partner, the wife's income would be assessed in the husband's hands, but as earned income."

To similar effect were the views Mr. V.S. Sundaram expressed in his Law of Income-tax in India, 7th edition, at page 126.

In our opinion of the two views set out above, that taken by the learned authors, Kanga and Palkhivala would appear to be correct. Earned income relief can be claimed only by the assessee, whose income, his own as well as that which is deemed to be his by any legal fiction, is assessed to tax. Sections 16 (1) (*c*), 16 (3), 23-A and 44-D are instances of such legal fictions. They would all be cases of income of another person included in the assessee's income within the meaning of the last clause of section 2 (6-AA) of the Act. Since it is only the assessee that can claim earned income relief, "such income" as that expression has been used in section 2 (6-AA), must be the income only of the assessee, though it has to be viewed as his income only by recourse to one or the other of the legal fictions enacted by the Act. The expression " such income" has, in our opinion, to be construed as income on which the assessee has to be assessed to tax. That, may, as in the case of the assessee before us, Marimuthu, include the income of any other person. But since it is not the other person who can be granted relief of earned income, section 2 (6-AA) does not, in our opinion, require that the other person, whose income is included in the income of the assessee, should either by himself or in conjunction with the assessee satisfy each of the three tests we have listed above as those imposed by section 2 (6-AA). In the construction of the statutory language of section 2 (6-AA), equitable considerations can play no part. If the wife or minor child, whose income is treated as the assessee's and taxed as such, does not participate in the conduct or management of the business of the firm, nonetheless, if the assessee particpated in the management or conduct of the business of the firm, the assessee would be entitled to earned income relief. Per *contra*, if the assessee himself did not participate in the conduct or management of the business of the firm, the fact, that the wife or the minor son participated in such management and conduct, could not be a relevant factor, even on equitable considerations, in deciding whether the assessee is entitled to earned income relief on the share, which in law accrued to and vested in the wife or the minor children.

These considerations apart, it appears to us that the language of section 44-E (which is one of the classes of cases where the income of one person is deemed to be the income of another) precludes the construction that the activity posited in the case of income falling within the " inclusive" portion of the definition in section 2 (6-AA) is that of some person other than the assessee. Sub-sections (1) and (2) of section 44-D which are relevant in the present context run:

" 44-D (1). Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such persons would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in the taxable territories, acquired any rights by virtue or in consequence of which he has within the meaning of this section power to enjoy such income, whether forthwith or in the future, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act.

(2) Where any person receives or is entitled to receive, whether before or after any transfer of assets by virtue or in consequence whereof either alone or in conjunction with associated operations any income becomes payable to a person not resident or resident but not ordinarily resident in the taxable territories, any sum paid or payable by way of a loan or repayment of a loan or any other sum, being a sum which is not paid or payable for full consideration in money or money's worth, paid or payable otherwise than as income, such income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section be deemed to be the income of the first mentioned person for all the purposes of this Act."

The " deeming " is for all the purposes of the Act which in effect effaces the personality of the person actually in receipt of the income. In such a situation, it would be impossible to hold that the activity of " the second-mentioned person " was considered as the criterion for the judging of the eligibility of the " first-mentioned person " to earned income relief.

In our opinion, all that Marimuthu had to satisfy with reference to the third of the tests we have mentioned above was that he was actively engaged in the conduct of the business of the firm of which he was a partner. That test he satisfied. His claim that earned income relief should be granted not only on the basis of his share of the firm's profits but also on the shares of his minor sons, which were included in his assessable income under the provisions of section 16 (3) (*a*) (ii) of the Act, was well founded.

Our answer to the consolidated question referred to us is in the affirmative and in favour of the assessee. The assessee will be entitled to the costs of this Reference. Counsel's fee Rs. 250.

R.M. *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Indo-Union Assurance Co., Limited, Madras .. *Applicant**

v.

Commissioner of Income-tax .. *Respondent.*

Indian Income-tax Act (XI of 1922) Rules 2 (b) and 3 (a) of the Schedule—Profits of the insurance business—How computed—Permissible deduction in case of profit being reserved for the benefit of policy-holders—When could be claimed.

The reservation of a profit for the benefit of the policy-holders contemplated by Rule 3 (*a*) of the rules in the Schedule to the Income-tax Act is the reservation that takes place as a result of the recommendation of the actuary under paragraph 8 of Part II of Schedule IV to the Insurance Act. It is only when such a segregation of the fund is made which cannot be drawn upon by the company for any other purpose it would be a reservation within Rule 3 (*a*) of the Schedule to Income-tax Act which permits deduction in computing the assessable surplus of the profits of the insurance business. There is nothing in the Insurance Act which has the effect of statutorily reserving the entirety of the inter-valuation surplus for the benefit of policy-holders so as to attract the deduction under rule 3 (*a*) of the Schedule to the Income-tax Act.

Case Referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R.A. No. 410 of 1950-51 on its file for decision on the following questions of law.

The Advocate-General (*V. K. Tiruvenkatachari*) and *S. Swaminathan*, for Applicant.

C. S. Rama Rao Sahib, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This Reference under section 66 (2) of the Indian Income-tax Act raises for consideration the proper construction of rules 2 (*b*) and 3 (*a*) of Schedule I to the Indian Income-tax Act. The assessee is the Indo-Union Assurance Company Limited, Madras which carries on the sole business of life insurance; and in regard to the assessment for the assessment year 1947-48, the following question arose which has been referred to this Court for decision :

> "Whether on the facts and in the circumstances of the case, one half of the amount of Rs. 58,652 should not have been allowed as a deduction under Rule 3 (*a*) of the Schedule to Income-tax Act in computing the surplus for the purpose of Rule 2 (*b*) of the said schedule?"

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* Referred Case No. 57 of 1954. 2nd May, 1956.

The previous or accounting year in question is the calendar year 1946. The last actuarial valuation of the company was made for the inter-valuation period commencing from 1st January, 1942 and ending on 31st December, 1945. This disclosed a deficit of Rs. 1,642. The immediately preceding actuarial valuation which was made for the period from 1st April, 1937 to 31st December, 1941, disclosed an actuarial deficit of Rs. 49,745. The difference between the two, namely, the inter-valuation profit for the four years from 1942 to 1945 was Rs. 48,103.

The profits of an insurance business are, under section 10 (7) of the Income-tax Act, to be computed in accordance with the rules set out in the Schedule to the Act. Rules 1 to 5 are relvant to an assessee carrying on the business of life insurance, and rules 2 and 3 determine the basis upon which the profits or gains should be computed. The portions of the rules material to the present case are :

> 2. The profits and gains of life insurance business shall be taken to be either :—
>
> (a) The gross external incomings of the preceding year from that business less the management expenses of that year ; or
>
> (b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made for the last inter-valuation period ending before the year for which the assessment is to be made so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business.
>
> 3. In computing the surplus for the purpose of rule 2—
>
> (a) one-half of the amounts paid to or reserved for or expended on behalf of policy-holders shall be allowed as a deduction. Provided that in the first such computation made under this rule of any such surplus no account shall be taken of any such amounts to the extent to which they are paid out of or in respect of any surplus brought forward from a previous inter-valuation period :
>
> Provided further that if any amount so reserved for policy-holders ceases to be so reserved, and is not paid to or expended on behalf of policy-holders one-half of such amount, if it has been previously allowed as a deduction, shall be treated as part of the surplus for the period in which the said amount ceased to be so reserved :

In respect of the assessment now in question, the assessee filed a return, showing a profit Rs. 9,091 computed under rule 2 (*a*) of Schedule 1. The correctness of this figure is not in dispute. But as the higher of the two figures of the profits computed in accordance with rules 2 (*a*) and 2 (*b*) is to be the basis of taxation, the company also gave figures of its computation under rule 2 (*b*). After adding back some deductions which were not permissible and certain refunds, the total actuarial inter-valuation profit within rule 2 (*b*) was arrived at as Rs. 58,652. The Income-tax Officer added a further sum of Rs. 1,600 to the profit to be calculated under rule 2 (*b*) representing an item of bad debt disallowed, and as regards this addition there is no dispute. The total was computed at Rs. 60,252. If this figure were taken as the profits disclosed during the inter-valuation period, this would have to be divided by four, and the surplus for each year would be Rs. 15,063, and as the figure under rule 2 (*b*) is the higher, this would form the basis of taxation.

The assessee, however, raised a contention that there should be a deduction of one-half of the amount of the total inter-valuation profit under rule 3 (*a*) on the ground, that on the proper construction of the provisions of the Indian Insurance Act this entire inter-valuation profit was "reserved for the benefit of policy-holders". It is the correctness of this argument that is raised by the question now under reference.

There is no dispute as regards the figure arrived at on the basis of rule 2 (*a*). It is therefore unnecessary to say anything more about it, nor is there any dispute as to the result of the computation under rule 2 (*b*). Rule 2 (*b*), in its present form, dates from 1941, but it is unnecessary to spend any time over detailing the changes effected by the Amending Act of 1941, since it is common ground that this rule is directed to ascertain the true inter-valuation profit, that is, the difference between the profits as disclosed by two actuarial valuations separated from each other by a number of years. The language of this rule is far from clear, and there is such a repetitive periphrasis as to shroud in obscurity the exact meaning which the framers had in view. As we have already stated, in this reference we are not concerned with the ascertainment of the inter-valuation profit to be taken as the profit of the company for the purpose of taxation.

The only question is, is this inter-valuation profit or any part of it "reserved for the benefit of policy-holders" so as to permit the deduction of one half of this amount in computing the surplus for the purpose of rule 2, in the present case rule 2 (*b*). Rule 3 (*a*) refers to amounts paid to, or reserved for, or expended on behalf of policy-holders. The argument of the learned Advocate-General, who appeared on behalf of the assessee, was not that any of the inter-valuation profit was "paid to" or "expended on behalf of policy holders", but only that it was "reserved" on behalf of them, and that the provision of the Insurance Act, constituted a statutory reservation of these amounts on behalf of policy-holders so as to satisfy the terms of rule 3 (*a*).

We shall now set out in broad outline the argument on behalf of the assessee. Rule 3 (*a*) does not require the reservation for the benefit of the policy-holders to be by a particular authority or that it should be in any particular manner. The rule would be satisfied if under the law any amounts were reserved for the benefit of the policy-holders, and the company is unable to use it for any other purpose. That reservation need not be by the actuary, or carried out in the balance-sheet, or by appropriation by the Directors. But it is sufficient if the relevant statute, in this case the Insurance Act, 1938, of its own force effects this reservation. So far, this argument is sound, and the learned counsel for the Commissioner did not contend that if the statute reserved any part of the surplus to the policy-holders, it would not be a reservation within rule 3 (*a*). The question, however, is whether the Insurance Act has done so.

The provisions of the Insurance Act were analysed by the learned Advocate-General, and he placed particular reliance on section 49 as effecting this statutory reservation. We shall be setting out the section in an instant. But before doing so, it would be convenient to refer to the other provisions which were referred to in this connection. Section 10 (2) makes provision for the manner in which an insurer who carries on the business of life insurance should keep the receipts in respect of that business. Section 10 (2) runs thus :

> " Where the insurer carries on the business of life insurance all receipts due in respect of such business shall be carried to and shall form a separate fund to be called the life insurance fund the assets of which shall after the expiry of six months from the commencement of the Insurance (Amendment) Act, 1946 be kept distinct and separate from all other assets of the insurer and the deposit made by the insurer in respect of life insurance business shall be deemed to be (part of the assets of such fund) and every insurer shall, within the time limited in sub-section (1) of section 15 in regard to the furnishing of the statements and accounts referred to in section 11, furnish to the Controller a statement showing in detail such assets as at the close of every calendar year duly certified by an auditor or by a person qualified to audit under the law of the insurer's country:
>
> Provided that such statement shall, in the case of an insurer to whom section 11 applies, be set out as a part of the balance-sheet mentioned in clause (*a*) of sub-section (1) of that section:
>
> Provided further than an insurer may show in such statement all the assets held in his life department, but at the same time showing any deductions on account of general reserve and other liabilities of that department:
>
> Provided also that the Controller may call for a statement similarly certified of such assets as at any other date specified by him to be furnished within a period of three months from the date with reference to which the statement is called for.

In the case of composite companies carrying on life insurance along with other lines of insurance business, section 10 (3) enacts :

> " (3) The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly for any purposes (other than those) of the life insurance business of the insurer."

Section 13 contains the provision for the actuarial valuation and report. The operative part of this provision is to be found in sub-section (1) which runs thus :

> " Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India and also in the case of an insurer specified in sub-clause (*a*) [illegible]) or sub

clause (*b*) of clause 9 of section 2 in respect of all life insurance business transacted by him once at least in every three years cause an investgation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule."

The rest of the provisions deal with matters not very relevant in the present context. The Fourth Schedule which is referred to in section 13 (1) comprises two parts. The first part contains regulations for the preparation of abstracts of actuaries' reports and requirements applicable to such abstracts. Part II, which is really material in the present context, sets out the requirements applicable to an abstract in respect of life insuarance companies. The opening paragraph of this part contains the following requirements :

"The following tabular statements shall be annexed to every abstract prepared in accordance with the reqiurements of this part of this Schedule namely :

(*a*) a Consolidated Revenue Account, in the Form G annexed to this part of this schedule for the inter-valuation period (except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Controller an abstract in respect of that class of business ; and

(*b*) a Summary and Valuation in the Form H annexed to this part of this Schedule of the policies included at the valuation date in the class of business to which the abstract relates ; and

(*c*) a Valuation Balance-Sheet in the Form I annexed to this Part of this Schedule and

(*d*) . . . .

and every such abstract shall show:

(6) The basis adopted in the distribution of profits as between the insurer and policy-holder and whether such basis was determined by the instruments constituting the company, or by its regulations or bye-laws, or how otherwise ;

. . . .

(8) (1) The total amount of profits arising during the inter-valuation period, including profits paid away and sums transferred to reserve funds or other accounts during that period, and the amount brought forward from the preceding valuation (to be stated separately) and the allocation of such profits.

(*a*) to interim bonus paid :

(*b*) among policy-holders with immediate participation giving the number of the policies which participated and the sums assured thereunder (excluding bonuses).

(*c*) among policy-holders with deferred participation giving the number of the policies which participated and the sums assured thereunder (excluding bonuses).

(*d*) among policy-holders in the discounted bonus class giving the number of the policies which participated and the sums assured thereunder (excluding bonuses).

(*e*) to the insurer or, in the case of an insurance company, among share-holders or to shareholders' accounts (any such sums passed through the accounts during inter-valuation period to be separately stated).

(*f*) to every reserve fund or other fund or account (any such sums passed through the accounts during the inter-valuation period to be separately stated) ;

(*g*) as carried forward unappropriated."

The Consolidated Revenue Account which is to conform to the requirements of Form G might be referred to before dealing with the terms of section 49. Form G is in these terms :

FORM G.

Consolidated Revenue Account of for years commencing and ending.

Business within India.	Total.	Business within India.	Total.
	Rs.		Rs.
Claims under policies (including provision for claims due or intimated) less re-insurances :—		Balance of Life Insurance Fund at the beginning of the period.	
By death		Premiums less re-insurances.	
By maturity.			

Annuities, less Re-insurances Surrenders (including surrenders of bonus) less Re-insurances.

Bonuses in cash, less Re-insurances.

Bonuses in reduction of Premiums less Re-insurances.

Expenses of Management (*b*), (*e*).

1 (*a*) Commission to insurance agents (less that on reinsurances).

(*b*) Allowances and commission (other than commission included in sub-item (*a*) preceding.

2. Salaries, etc., other than to agents and those contained in Sub-item 1 (*b*) preceding).
3. Travelling expenses.
4. Directors' fees.
5. Auditors' fees.
6. Medical fees.
7. Law charges.
8. Advertisements.
9. Printing and Stationery.
10. Other expenses of management (accounts to be specified).
11. Other payments (accounts to be specified).
12. Rent for offices belonging to and occupied by the insurer.
13. Rents of other offices occupied by the insurer.

Bad debts.

United Kingdom, (Indian), Dominion and Foreign taxes.

Other expenditure (to be specified).

Profit transferred to Profit and Loss account.

Balance of life insurance Fund at end of the period as shown in the balance-sheet.

(i) First year premiums.

(ii) Renewal premiums.

(iii) Single premiums.

Consideration for annuities granted less Re-insurances (*c*) Interest, Dividends and Rents Rs.

Less Income-tax thereon (*b*) Rs.

Registration fees.

Other income (to be specified) Loss transferred to Profit and Loss Account.

Transferred from appropriation account.

Form I is the form of the valuation Balance-sheet from which inter-valuation profits are ascertained and runs thus :

FORM I.

Valuation Balance-sheet of as at 19

	Rs.		Rs.
Net liability under business as shown in the Summary and Valuation of Policies.		Balance of Life Insurance Fund as shown in the Balance-sheet.	
Surplus, if any.		Deficiency if any.	

Now we might refer to section 49, on which almost the entire case of the assessee is rested :

"49 (1) No insurer, being an insurer specified in sub-clause (*a*) (ii) or sub-clause (*b*) of clause (9) of section 2, who carries on the business of life insurance or any other class or sub-class of insurance business to which section 13 applies shall for the purpose of declaring or paying any dividend to shareholders or any bonus to policy-holders or of making any payment in service of any debentures, utilize directly or indirectly any portion of the life insurance fund or of the fund of such other class or sub-class of insurance business, as the case may be, except a surplus shown in the valuation balance-sheet in Form I as set forth in the Fourth Schedule submitted to the Controller as part of the abstract referred to in section 15 as a result of an acturial valuation of the assets and liabilities of the insurer ; nor shall

> the increase such surplus by contributions out of any reserve fund or otherwise unless such contributions have been brought in as revenue through the revenue account applicable to that class or sub-class of insurance business on or before the date of the valuation aforesaid except when the reserve fund is made up solely of transfers from similar surpluses disclosed by valuations in respect of which returns have been submitted to the Controller under section 15 of this Act or to the Central Government under section 11 of the Indian Life Assurance Companies Act, 1912.
>
> Provided that payments made out of any such surplus in service of any debentures shall not exceed fifty per cent. of such surplus including any payment by way of interest on the debentures and interest paid on the debentures shall not exceed ten per cent. of any such surplus except when the interest paid on the debentures is offset against the interest credited to the fund or funds concerned in deciding the interest basis adopted in the valuation disclosing the aforesaid surplus.
>
> Provided further that the share of any such surplus allocated to or reserved for the share-holders including any amount for the payment of dividends guaranteed to them, whether by way of first charge or otherwise shall not exceed seven and a half per cent. of such surplus.

The prohibition enacted by this section is enforced by section 106 under which the directors of an Insurance Company who diminish the amount of the life-fund by distribution contrary to the terms of the enactment are subjected to punishment. Section 106 (1) runs thus :

> "106 (1): If on the application of the Controller or an Insurer or any member of an insurance company or any policy holder or the liquidator of an insurance company in the event of the insurer being in liquidation the Court is satisfied that by reason of any contravention of the provisions of this Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the insurer shall be deemed in respect of the contravention to have been guilty of misfeasance in relation to the insurer unless he proves that the contravention occurred without his consent or connivance and was not faciliated by any neglect or omission on his part; and the Court shall have all the powers which a Court has under sections 235 and 237 of the Indian Companies Act, 1913, and shall also have the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.

The steps in the argument of the learned Advocate-General were shortly these : An inter-valuation profit even though it might be merely a difference between two deficiencies is still a real profit. That is the basis upon which rule 2 of the Schedule in the Income-tax Act proceeds, and this is in accordance with commercial practice. The position in England, under the provisions of the English Finance Act in conjunction with the Life Assurance Act, was said to be that the inter-valuation profit in regard to a company still in deficit was treated as a real profit divisible among the shareholders and liable to be brought to tax as a true profit of the Insurance Company. It was urged that in India the position was altered by the terms of section 49, by which inter-valuation profits were made not available to the shareholders until the life-fund disclosed a surplus in the left hand column of Form I, annexed to Fourth Schedule Part II of the Insurance Act, 1938. As the shareholders were prevented from utilising this type of inter-valuation profit, it was urged that it was "reserved for the policy holders" by the statute, and that this satisfied the terms of rule 3 (*a*) of the Schedule to the Income-tax Act.

We are unable to accept this argument of the learned Advocate-General as to the effect of section 49. The position in England so far as the taxation of the Assurance Companies are concerned appears to be shortly this :

Section 426 (1) of the U. K. Income-tax Act, 1952, enacts :

> "Where an assurance company carries on life assurance business in conjunction with assurance business of any other class, the former business is treated for income-tax purposes as a separate business.

As regards the taxation of the profits and gains of an insurer carrying on life assurance business the position is thus summed up in Simon :

> " The Crown has an option to assess an assurance company either under Case I in respect of its profits or under Case III, IV or V Schedule D upon its investment income. In other words, the Crown can assess the company's balance of profits or gains under Case I of ScheduleD, or alternatively it can assess the individual items of the company's investment income. This election of the Crown rests upon the principle that if a statute authorises taxation under alternative methods, the selection of the alternative lies with the taxing authority....
>
> " Where the profits of an assurance company in respect of its life assurance business are computed under Case I of Schedule D, that part of the profits which belongs to, or is allocated to, or is reserved for, or is expended on behalf of, policy-holders or annuitants has to be excluded in making the computation. But profits excluded because they are reserved for policy holders or annuitants, which

cease at any time to be so reserved, and are not allocated to, or expended on behalf of, policy holders or annuitants, have to be treated as profits of the company for the year in which they ceased to be so reserved " (*Income-tax Act*, 1952, section 427 (1), (*Simon's Income-tax Second Edition*) Volume I at page 427).

We are not able to appreciate the contention, that the provisions of the Indian Insurance Act effects a reservation of the entirety of the inter-valuation surplus for the benefit of policy holders within rule 3 (*a*) of the Schedule to the Income-tax Act. To start with, we might mention, merely to put aside, the provision in section 10 (2) and (3) regarding separation of accounts and the uses to which the life-fund could be put. These provisions, which have been taken from the Life Assurance Companies Act of England serve to segregate the funds pertaining to life assurance from other funds of composite companies but effect no allocation among the several purposes for which the funds of a life assurance company could be put. It is not the contention of the assessee that the corresponding provision in England has ever been held to constitute a reservation for policy holders within section 427 of the Income-tax Act, 1952 or the earlier provisions it re-enacted.

Does section 49 of the Insurance Act, a similar provision to which is not in the U.K. Act, effect this reservation ? We are clearly of the opinion that it does not. Reservation for the benefit of Policy holders has to be a positive provision, whereas what section 49 enacts is only a prohibition—a prohibition against the use of the inter-valuation surplus of a particular kind for specified purposes. But for it, a dividend might be declared out of the sum or it might be used to service debentures issued by the insurer. Further among the prohibited uses are the payment of bonuses out of the funds of an insurer whose life-fund is till in deficit, and this in our judgment must inescapably lead to the rejection of the argument on behalf of the assessee.

Section 49 divides so to speak the profits of an insurer into two categories—an inter-valuation surplus and a surplus disclosed by a balance-sheet in Form I, which latter emerges only when the life-fund is in excess of the net actuarial liabilities and prohibits the distribution either to share-holders or policy holders of an inter-valuation surplus where the company is still in deficit and permits distribution subject to exceptions not relevant here, only of the surplus disclosed in the left hand side in Form I of the valuation balance-sheet.

Further a close examination of Form G in the Fourth Schedule to the Insurance Act shows that there is no basis for the theory that an inter-valuation surplus is reserved for policy holders by statute. The balance of the life-fund at the beginning of the period together with the further additional income which flows into it goes into making up the total on this side. The balance at the end of the year which is shown at the end of the left hand column of the account need not always or necessarily be in excess of the figure which forms the first item on the right hand side. During the year the Company might have expended sums over and above the net receipts for the year by way of expenses of management which would include salaries to the staff, their travelling expenses as well as the remuneration to the Directors, etc., these being some of the 13 heads under which expenses of management are classified in that form. There might also be bad debts in the investment of the life-fund which might be written-off during the year. The net result of taking into account all these items might very well be that the life-fund at the end of the year is less than the life-fund at its beginning. If the argument of the learned Advocate-General should be accepted, a life-fund can never diminish because it is exclusively set apart for the policy-holders and the company cannot draw on it for any purpose except for payment of claim. But surely that is not the position ; and as the company is able to deal with the life-fund on the basis of which, of course the inter-valuation surplus is calculated it is subject to diminution by expenditure on items other than payment of claims under policies. Therefore the life-fund is at the disposal of the company for being used to meet its expenses, including the salaries of the Directors and their allowances, to mention only a few, which would clearly show that there is no reservation for policy-holders. The fact that, the life-fund is not a fixed sum but a fluctuating one, though of course in a majority of cases having a tendency to increase, with still the possibility of there being a diminution of it reveals its true character. The inter-valuation profit is really an actuarial computation of the liabilities to which the life-fund is subject at two dates separated from each other by a fixed number of years. In making these observations we are disregarding the fact that among the assets taken into account for making the actuarial calculation to the probability of the receipt of the renewal premiums as well as their investment is taken into account. In the present case, what is relevant is the fact, that a portion of the life-fund, which might be said to represent that inter-valuation profits, can be utilised by the company for its purpose as seen from Form G, the Revenue Account. In the light of these considerations, we are clearly of the opinion that what rule 3 (*a*) contemplates is the reservation that takes place as a result of the recommendation of the actuary under paragraph 8 of Part II of Schedule IV to the Insurance Act. When once such a reservation has been made it cannot be drawn upon by the Company for being used for any purpose of its own including the expenses of management. There is a segregation of that fund and it gets impressed with a trust in favour of the policy holders. It is only taken that it would be a reservation within rule 3 (*a*) of the Schedule. Moreover the second proviso to rule 3 (*a*) would appear to indicate a reservation of this type and not one where there is merely a prohibition against uses falling within specified categories.

In our judgment, the construction adopted by the Tribunal is correct and the question is answered in the negative and against the assessee. The Commissioner of Income-tax is entitled to his costs, counsel's fee Rs. 250.

R.M. ——— *Question referred answered in the negative and against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

TS.PL.P. Chidambaram Chettiar .. *Appellant**

v.

T.K.B. Santana Ramaswami Odayar and others .. *Respondents.*

Madras Estates Land Act (I of 1908, *as amended by Madras Act (XVIII of* 1936), *section* 3 (2) (d), *Explanation I—" Estate "—Whole inam village—Lands in village comprised in Tanjore Palace Estate—Lands treated as private by Raja—Seizure of lands by East India company and regrant after* 7 *years—Effect of—Tenants in possession for long period and paying only customary rents and not actual rent—Leases by tenants admitting both melvaram and kudivaram in lesser—Effect of—Right of tenants to permanent occupancy.*

In 1799, the then Raja of Tanjore, Sarabhoji consented to resign the Government of the country wholly into the hands of the East India Company provided they made a suitable provision for the maintenance of his rank and dignity ; and a treaty was entered into between the Raja and the East India Company, under which Tanjore became a British Province and the Raja had ensured to him a fixed annual allowance of one lakh of pagodas with a fifth of the net revenues of the country. Raja Sarabhoji enjoyed his rank and dignity with the pecuniary benefits attached to it for thirty four years and, on his death in 1832, the same honours and privileges were continued to his son, Sivaji, until his death in 1855. No reservation was made in the treaty as to any territory except the Fort of Tanjore being retained by the Raja in his possession ; but it so happened that Raja Sarabhoji was permitted to retain a number of villages and lands with the palaces situated in the different parts of the country. The landed property thus retained by the Raja at the cession of the country, with certain additions subsequently made to it by purchase by Raja Sarabhoji and Sivaji consisted of about 199 villages known as the Tanjore Palace Estate.

After Sivaji's death in 1855, these villages were taken over by the East India Company and they remained in the possession of the company for nearly seven years when, in 1862, the possession of the same was made over to the widows of the last Raja. These were sometimes described as Mokasa villages, and the only items of revenue paid by these were a small police fee, the water rate for irrigating dry lands with Government water and cess. Certain items of these properties comprised in Orathur padugai were sold in execution of a decree of the Court of the District Judge of West Tanjore in 1945 and purchased by one Chockalingam Chettiar, who sold them in 1948 to the plaintiff-appellant. The appellant in 1949 sued to eject the respondents from these lands and for damages for use and occupation for a period of four years before suit at Rs. 50 per acre, alleging that the appellant was the absolute owner of the lands and as such entitled to recover possession. The respondents (defendants) pleaded that the plaintiff had acquired only the melwaram right, which was all that was sold in execution and that the defendants were kudiwaramdars not liable to be ejected, the lands in suit being part of an estate as contemplated by the Madras Estates Land Act. The trial Court held that the appellant failed to discharge the burden that lay upon him to prove that the lands were his private lands, that the defendants were entitled to occupancy rights, that the Court had no jurisdiction to entertain the suits, 19 in number, and dismissed them.

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*Appeals Nos. 223 and 224 of 1951 and 264 to 280 of 1952. 10th January, 1956.

There was no documentary evidence to show any grant of an inam or the nature of the inam. But the documentary evidence showed that from 1850 up to the present day the Orathur padugai undoubtedly was an independent entity paying an assessment and was never considered as a pasture ground. The village had been assessed as early as 1830. There were agricultural lands in the padugai in which crops were raised and in some documents covering a period between 1870 and 1877 there were recitals that some of the lands were cultivated and that the tenants resided in the village. The padugai was treated as a separate and distinct village in the settlement registers and in the D.C.B. account and other documents from 1868 right up to 1907. There were also leases for a period ranging from 1901 to 1906 which contained a clause to the effect that if the tenant planted any trees and reared them, on the expiry of the lease they shall belong to the estate. There was also a large body of documents mainly leases by the Receiver of the estate, both before and after 1936 wherein the lessees undertook to surrender the property at the expiration of the lease period and admitted that both the warams vested in the Tanjore Palace Estate that the lands did not come within the purview of the Estates Land Act. It was also in evidence that at the auction sales of leases of the lands one and the same of the defendants (tenants) had bidden and purchased portions of the lands for cultivation. but at the same time for a long long either the same individual or his predecessors were purchasing the same and in auction, and there was continuous occupation of the lands by the tenants. But customary rents alone were collected from the tenants and not the actual rent even from early times.

Adaiolai muchilikas containing agreements covering a period from 1870 to 1879, and leases from 1895 to 1945 showed that the transactions in them were such as would be between an ordinary lessor and lessee with reference to private property as regards payment of rent, ownership of the lessor and the liability of the lessee to surrender the lands on the expiration of the lease.

In some leases the tenants agreed to reopen the irrigation channels and to maintain them in good condition and also pay water cess if necessary.

Held : (1) that whatever might have been the nature or character of the lands prior to the seizure of the lands by the East India Company in 1855, all the previous tenures and rights that existed must be deemed to have been wiped out by the seizure and the grant or restoration of 1862 should be considered to be the root of a new title, from which alone the rights of the parties should be traced.

Nawab Malka Jahan Sahiba v. *Deputy Commissioner of Lucknow*, (1879) L.R. 6 I.A. 63 ; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, (1859) 7 M.I.A. 476; *Vajesingji Joravarsingji* v. *Secretary of State for India*, (1924) 47 M.L.J. 574 : L.R. 51 I.A. 357 : I.L.R. 48 Bom. 613 (P.C.). *Cook* v. *Sprigg*, L.R. 1899 A.C. 572, referred to.

(2) That the East India Company could have granted only the melwaram right and the grant in 1862 conveyed to the Raja's heirs only the melwaram in the lands ;

(3) that when the entire evidence was before the Court the onus of proof was only a matter of minor interest, as the case has to be decided mainly on the evidence;

(4) Admissions by the tenants in the leases or muchilikas executed by them should not be taken as absolutely binding on them, as the documents themselves showed that the lands were in the continuous occupation of the defendants as tenants.

Buchayya v. *Raja Parthasarathy Appa Rao*, (1921) 41 M.L.J. 669 : L.R. 48 I.A. 387 : I.L.R. 44 Mad. 856 (P.C.) relied on.

(5) that though no definite conclusion was possible with regard to the nature of the lands prior to 1855, the grant of 1862, so far as the suit lands were concerned, was of the whole inam village in which the lands lay, which became an estate under Madras Act XVIII of 1936 and

(6) as the tenants had a permanent right of occupancy they were not liable to be evicted.

Chinna Basavayya v. *Satya Bhigna Theerthaswamulu Varu*, (1950) 2 M.L.J. 607; *Janakirama* v. *Gopalan*, (1951) 2 M.L.J. 272 : *The District Board, Tanjore* v. *Noor Mahomed, Rowther* (1952) 2 M.L.J. 586 : 65 L.W. 98 (S.C.) distinguished.

Sundaram Iyer v. *Ramachandra Iyer*, (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.) discussed and explained.

Case law discussed and reviewed.

Appeals against the decree of the Court of the Subordinate Judge of Tanjore, dated 31st October, 1950 and passed in O.S. Nos. 75 of 1949, 77 of 1949, 79 of 1949, 80 of 1949, 81 of 1949, 19 to 22 of 1950, 24 to 31 of 1950, and 78 of 1949 and the decree dated 2nd February, 1951 and passed in O.S. No. 23 of 1950 respectively.

R. Kesava Ayyangar, E. A. Viswanathan, T. V. Satagopachari, for Appellants.

T. M. Krishnaswami Ayyar, G. R. Jagadisan, S. Tyagaraja Ayyar, V. S. Venkatarama Ayyar, M. Ranganatha Sastri and *S. Somasundaram* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—These nineteen appeals arise out of suits tried together by the learned Subordinate Judge of Tanjore in all of which the plaintiff was the same while the defendants in the various suits were different. Since the questions for trial and decision were identical in all the suits, by consent of parties, evidence both oral and documentary was recorded only in one of the suits, *viz.*, O.S. No. 75 of 1949 and the same was treated as evidence in the other suits as well. The learned Subordinate Judge delivered a common judgment in all the suits. With the consent of the parties the same procedure is adopted in this Court also and hence we propose to deliver a common judgment in all these appeals.

The appellant in these appeals was the plaintiff in the Court below who aggrieved by the dismissal of his suits by the trial Court has come up here questioning the correctness of the learned Judge's conclusions. Appeal No. 223 of 1951 arises out of O.S. No. 75 of 1949 and Appeal No. 224 of 1951 arises out of O.S. No. 77 of 1949. Against the dismissal of the above two suits appeals have been preferred directly to this Court where as the remaining seventeen appeals which had been preferred to the District Court, West Tanjore, have been transferred to this Court to be heard along with Appeals Nos. 223 and 224 of 1951. Reference to the plaintiff in this judgment would mean the appellant in all the appeals and the defendant should be understood as the respective defendant or defendants in the several suits.

The properties in dispute in Appeal No. 223 of 1951 consist of seventeen items of an area of 56 acres and 10 cents in inam Pannimangalam village, Mannargudi taluk, West Tanjore District as is seen from Exhibit B-8. Record of Rights Register relating to inam Pannimangalam village, and these seventeen items are admittedly part of Orathur padugai (படுகை) which is either a whole inam village or a minor inam forming part of 199 villages popularly known as the Tanjore Palace Estate. Likewise the items of properties comprised in the other suits also are included in the Orathur padugai. The suits were for ejectment of the respective defendants from the suit lands and for damages for use and occupation for a period of four years before the date of the suit at the rate of Rs. 50, per acre on the ground that the plaintiff is the absolute owner of the lands and hence entitled to recovery of possession. It is stated in the plaint that under Exhibit A-145 dated 11th November, 1948 the plaintiff purchased these items from one S.S. Chockalingam Chettiar who in his turn acquired title to them as a result of a sale certificate issued to him when these items were sold under E.P. No. 63 of 1937 in O.S. No. 3 of 1919 on the file of the District Court, West Tanjore. Exhibit A-146 dated 14th April, 1945 is the sale certificate issued in favour of the plaintiff's vendor, S.S. Chockalingam Chettiar. Under Exhibit A-167 dated 7th August, 1946, the plaintiff's vendor took delivery of the properties. The contention on behalf of the defendants is that what was sold in execution of the decree in O.S. No. 3 of 1919 was only the melvaram right which a landlord under the Madras Estates Land Act has and that the defendants in the various suits are kudivaramdars not liable to be ejected. In other words, the lands in question are parts of an estate as contemplated by the Madras Estates Land Act in which case the plaintiff's suits will have to be dismissed. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to discharge the burden that lay upon him to prove that the lands in question are private lands and since that onus has not been discharged and as the defendants are entitled to occupancy rights, the Court had no jurisdiction to entertain the suits and hence all the suits were dismissed.

That the disputed lands are part of Orathur padugai comprised in one of the villages forming the Tanjore Palace Estate has not been questioned in these appeals and what has now to be considered is whether they lie in an estate or not. The main allegations in the plaint are : that the defendant is a trespasser having no right to remain in possession as the lands are not governed by the Madras Estates Land Act, and they do not come within the definition of the Estate, and they lie in a minor inam. It was further alleged that there has been no letting of the plaint lands to the defendant and there has been no relationship of landlord and tenant between the plaintiff or his predecessors-in-title and the defendants. It is also alleged that the lands are private lands in which no right of occupancy can be claimed by any length of possession. The defendant is a fugitive occupant and not being a cultivating tenant has no right of occupancy. The lands are padugai lands forming part of the river bed or bund and cannot become ryoti lands. On the other hand, the plea raised on behalf of the defendants is that the suit lands along with other lands formed part of Tanjore Palace Estate which is said to be an inam and is governed by the Madras Estates Land Act; they cannot be private lands of the plaintiff or his predecessor-in-title; neither the plaintiff nor his predecessor-in-title had ever cultivated the lands either by hired labour or by themselves, nor did they exercise any act of possession or enjoyment. The melvaram in the suit lands alone was enjoyed by the successive receivers who were in charge of the Tanjore Palace Estate and after division by the owners thereof. The defendant further submitted that the suit lands being ryoti lands situate within an estate, the Court had no jurisdiction to entertain the suit for ejectment.

The village where the lands in question are situate is a separate village for which separate revenue accounts are maintained with a record of rights prepared for it. In any event it is contended that the village in question is an estate under the extended meaning of the term defined in Madras Act VIII of 1934 and XVIII of 1936 and, if that is so, the Court had no jurisdiction to entertain the suits. The allegation in the plaint that the lands lie in a minor inam is denied and even granting that it is a minor inam, it is nevertheless an estate. The decision of the appeals has, therefore, to depend upon the question whether the lands are included in an estate as defined in the Madras Estates Land Act or whether they are private lands as claimed by the plaintiff. It is no body's case that there is an intermediary stage.

The main issue framed in all the suits by the trial Court was

> "whether the suit lands are either minor inams or private lands as alleged by the plaintiff or whether they are ryoti lands in an estate as contended by the defendant?"

The learned Subordinate Judge held this issue in favour of the defendants.

The history of what is ordinarily known as the Tanjore Palace Estate has been described in decisions by the highest judicial authority and they are found in the various reported decisions of the Madras High Court and the Privy Council, beginning with *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*[1]. A recent decision of the Privy Council in *Secretary of State for India* v. *Thinnappa Chettiar*[2], gives a succinct description of the same at pages 233 and 234.

In 1799 the then Raja of Tanjore Sarabhoji consented to resign the Government of the country wholly in to the hands of the East India Company provided they made a suitable provision for the maintenance of his rank and dignity and a treaty was entered in to between the Raja and the East India Company. Under this treaty Tanjore became a British province and the Raja had ensured to him a fixed annual allowance of one lakh of pagodas or three and a half lakhs rupees with a fifth of the net revenues of the country; Raja Sarabhoji enjoyed his rank and dignity with the pecuniary benefits attached to it for thirty four years and on his death in 1832, the same honours and privileges were continued to his son Sivaji until his death in 1855. No reservation was made in the treaty as to any territory except the Fort of Tanjore being retained by the Raja in his possession; it so happened that Raja Sarobhoji was permitted to retain a number of villages and lands with the palaces situated in the different parts of the country. The landed property thus retained by him at the cession of the country, with certain additions subsequently made to it by purchase by Rajas Sarabhoji and Sivaji are stated to constitute the 199 villages, the nature of which is now in dispute.

After Sivaji's death in 1855 these villages were taken over by the East India Company and they remained in the possession of the company for nearly seven years when in 1862 the possession of the same was made over to the widows of the last Raja. One of the questions for decision in these appeals is with regard to the character of the lands in the possession of the heirs of the last Raja. Whereas on the side of the plaintiff, it is contended that these villages formed the private properties of the Raja's family and that on relinquishment by the East India Company in 1862 assumed the character of private property and as such, it cannot be an estate within the meaning of the Estates Land Act, the respondents contend that even if the original villages constituted private or separate property of the Raja giving back all of them to the heirs of the Raja would not be any relinquishment by which the original rights in the property were restored but that the grant constituted a fresh inam by the then Government and if that is so, the villages would come under the provisions of the Estates Land Act at least as amended in 1936. It may be mentioned that at page 825 of the Tanjore District Manual, 1871, these villages are stated as constituting the private property of the Raja's family.

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[1] (1859) 7 M.I.A. 476.

[2] (1943) 2 M.L.J. 382 : L.R. 70 I.A. 112 : I.L.R. (1944) Mad. 227 (P.C.).

In the Gazetteer of the Tanjore District, Volume I, at page 192, published in 1906, the following description is found :—

> "The private estate of the late Raja is still enjoyed by his family and is managed by a receiver subordinate to the District Judge. These mokasa villages are chiefly to be found in the Tanjore and Kumbakonam taluks but there are also a fair number in Mannargudi and a few in all the taluks except Nannilam. There are 199 villages so classified as well as some detached pieces of land amounting in all to over 35,000 acres. The only items of revenue paid by these are a small police fee, the water rate for irrigating dry lands with Government water and cess."

Such being the case, we have to find out how the judicial decisions have dealt with the nature of these estates. On behalf of the appellant, as stated, it is argued that the properties of the last Raja of Tanjore which had been seized by the East India Company as an act of State but were restored to his heirs did not constitute an inam as there was no grant at all but amounted only to a relinquishment by the East India Company in favour of the heirs with the result that the properties did not assume the character of an inam but retained the character of private property in the hands of the heirs of the last Raja of Tanjore. If the properties are not inams, then it is not possible to apply the amending Act XVIII of 1936, to the lands in question.

We propose, therefore, to review as succinctly as possible the various decided cases on the subject and then proceed to discuss the evidence in the case.

The decision in the *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*[1], arose out of an appeal from the decree on the equity side of the Supreme Court at Madras by which it was declared that the eldest widow of the late Raja of Tanjore who, as stated already, was without issue became entitled to inherit and possess his private and particular estate, real and personal, left by him at the time of his death and which the East India Company, representing the British Crown, had seized on 18th October, 1856. The Secretary of State for India appealed against that decision and their Lordships of the Judicial Committee, by their judgment delivered by the Right Hon'ble Lord Kingsdown, held that as the seizure was made by the British Government acting as a sovereign power through its delegate, the East India Company, it was an act of State, and a municipal Court had no jurisdiction to enquire into its propriety. The 199 villages which later on came to be known as the Tanjore Palace Estate were among the properties seized by the East India Company. The nature of these villages did not come up for decision but from the statement of facts reported at page 482 it is seen that in the letter from the Chief Secretary to the Government of Madras to the Government of India there was the following statement :—

> "Thirdly there are some valuable villages belonging to the Raja in different parts of the province, some retained by the Sevajee when the country was assumed by the British Government and some subsequently acquired by purchase. These should be examined and any claims to or liens upon them considered. Fourthly some dues by the late Raja to private parties or claims on behalf of the members of the family still remain to be settled."

The distinction between public and private property of a Hindu sovereign was noticed in the sense that upon his death his private property goes to one set of heirs and the Raja and the public property to the succeeding Rajah. At page 495 from the extracts of the Judgment of the Chief Justice, Sir Christopher Rawlinson, it is seen that Rajah Sivajee died possessed of both private and self-acquired property both real and personal. Then again at page 503 in the same judgment with regard to the seizure, it has been described as an indiscriminate seizure both of public and private property and at page 504 the learned Chief Justice observes :

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[1] (1859) 7 M.I.A. 476.

> "that an order having been issued to take possession of public property, private property was taken, and is now detained and that such detention cannot be considered an act of State".

The Privy Council did not differentiate between the kinds of properties seized and it only expressed the opinion that since the seizure was an act of State the municipal Courts could not entertain any action regarding that and therefore reversing the decision of the Supreme Court of Madras the suit by the plaintiffs was dismissed. Thereafter there were certain proceedings in India.

On receipt of the judgment of the Privy Council the minute by the Honourable the President Sir Charles E. Trevelyan, dated 8th November, 1859, was appended to that. There is some discussion about the nature of the landed property seized in paragraph 14, at page 546 :

> "The bulk was retained by the Rajah contrary to the provisions of the Treaty by which the Province was ceded to the East India Company in 1779 ; but according to my view as expressed in the early part of this minute, it matters not in what manner the property came into the possession of the Rajah. Whatever actually belonged to the Rajah at the time of his death is included in the escheat, and now belongs to the Government."

There is still further discussion regarding the 14 villages claimed by the mother of the late Rajah as having been granted to her by her late husband, Rajah Sarabhoji and the minute showed that since the villages were not only managed but their proceeds were appropriated by the Rajah they were treated after 1827 entirely as his own property and therefore the question of these villages should form the subject of the escheat. We need not refer more to this decision because it was after 1862 that there was a re-grant or restoration of the villages to the Rajah's heirs.

The next decision relating to this estate is in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[1], which arose out of a suit by two widows of the late Rajah against the senior widow and an alleged adopted son of the late Rajah for a division of the immoveable properties which had been made over by the Government of Madras to the senior widow and for cancellation of the adoption, made after the death of the Rajah. The High Court held that during the time the Government held the estate, that is, during the interval between the death of the Rajah until the restoration of the estate by an act of State, it was held in absolute ownership in the Government and, therefore, the suit by the two widows could not be maintainable. Evidence regarding restoration or relinquishment is extracted in the statement of facts at page 428 which is as follows :

> "In Colonel Durand's letter above recorded, the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj regarding which this Government addressed them under, date the 17th May, last. Their decision is to the effect that since it is doubtful whether the lands in question can be legally dealt with as State property and since the plea in equity and policy for treating them as the private property of the Rajah is so strong that it commands the unanimous support, of the members of the Madras Government, the whole of the lands are to be relinquished in favour of the heirs of the late Rajah."

In the judgment of the Court we find at page 445 the following expression of opinion :

> "For these reasons we are of opinion that this Court is bound to consider the transfers under the order as a grant of grace and favour by the Government in right of their absolute sovereign ownership, just as if it had been thought proper to make the disposition in favour of persons who were not the nearest representatives and consequently that the widow's and daughter's proprietary rights are derivative from the Government and have no relation back to inheritance on the death of the Rajah. It is only on the ground that the Government had confessed themselves completely in the wrong in regard to possession of the property and passed the order as a reparation that the Court could hold differently, and we think the contrary of that inconsistent and most unlikely position appears".

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[1] (1868) 3 M.H.C.R. 424.

An argument is put forward on behalf of the appellant that the effect of the restoration or relinquishment is only the undoing of a wrong and therefore if the villages were the private properties of the Rajah at the time of the seizure then the same character is maintained when they were handed back to his widow.

There does not seem to have been any judicial pronouncement regarding the nature of these villages for nearly fifty years until the matter came up for discussion before a Full Bench in *Sundaram Iyer* v. *Ramachandra Iyer*[1], where the order of reference to the Full Bench was in very wide terms as to whether the Tanjore Palace Estate is an " Estate " within the meaning of section 3 (2) of Act I of 1908. The Civil Revision Petitions out of which the Full Bench reference arose were filed against the returning of the plaints filed in the Court of the Revenue Divisional Officer, Kumbakonam, under section 77 of the Madras Estates Land Act, I of 1908, on the ground that the revenue Court had no jurisdiction. Ayling, J., in formulating the question for reference to the Full Bench did not express any opinion on the point. Seshagiri Aiyer, J., in a more elaborate discussion referred to section 3 (2) of Act I of 1908 in order to find out under what provision of the sub-sections to the main section the villages came in. During the arguments before the Full Bench, Sir John Wallis, Chief Justice, stated that it was not possible to go back on the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[2], which stated that there was a grant and that resumability was not the essential *sine qua non* of an inam. It was also argued before the Full Bench that since inams were registered under Regulation XXXI of 1802 and the Palace Estate was not registered as such, it could not be considered to be an inam within the meaning of the definition 'Estate' under the Act. In his judgment, Sir John Wallis, C.J., traced the history of these 199 villages and referred to the earlier decisions to which we have already alluded and since it was admitted before him that the kudivaram right in the village which was the subject-matter of the appeal and in almost all the other villages, did not belong to the estate he came to the conclusion that the villages should be deemed to be inams within the definition in section 3 (2) (*d*) of the Act, and therefore answered the question in the affirmative. He was of the opinion that the nature of the inam was a peculiar one and though commonly known as mokhasa grant it cannot be said to have been granted on what is known as mokhasa but was intended to be regarded as an inam of a dignified character. He held the view that section 3 (2) (*d*) of Act I of 1908 brought within its ambit inams which were irresumable in character. In the end the learned Chief Justice came to the conclusion that all the villages constituting the Tanjore Palace Estate came within the definition of the " Estate " in section 3 (2) (*d*) of the Act. Seshagiri Ayyar, J., agreed with the learned Chief Justice while Sadasiva Ayyar, J., in assenting to the proposition that the particular village, namely, Mokhasa Ullikadai village was an estate restricted the scope of the reference to that village alone and did not want that the decision should be understood to cover all the villages comprised in the Tanjore Palace Estate.

Mr. Kesava Ayyangar for the appellant commented upon this decision by contending that it could not be that the decision of the Full Bench is applicable to the entire estate by supposing that resumability is necessary in all the inams and that because it was conceded in that case that the kudivaram right in Mokhasa Ullikadai village did not belong to the estate the scope of the Full Bench decision should be restricted to that particular village only. He also contended that the correct way of interpreting the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[2], is by stating that the original nature of the properties was restored by the relinquishment or restoration and if that is so, what was the private property of the Rajah retained its character as such and they became the private properties of the grantees after 1862. It cannot be disputed that the adjudication in *Sundaram Iyer* v. *Ramachandra Iyer*[1], can apply only to the parties to that litigation and any question regarding the nature of any of the other villages could not be *res judicata*

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1. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.)
2. (1868) 3 M.H.C.R. 424.

by reason of the Full Bench decision. Such being the case the Full Bench decision can only be a source of great authority.

Let us now see how this case was understood in subsequent judicial pronouncements and also how later decisions have discussed the nature of the other villages comprised in the Tanjore Palace Estate. In S.A. No. 1413 of 1924 Phillips, J., came the conclusion that the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1], did not mean to decide and in fact did not decide that the whole of the Tanjore Palace Estate was an "estate" within the meaning of section 3 (2) (*d*) of Act I of 1908 because the Full Bench did not definitely say that their answer to the reference should refer to all the villages comprised in the Tanjore Palace Estate but that it should be confined to the particular village in question. The finding of the lower appellate Court in that case was that the Palace Estate had both melvaram and kudivaram rights in the lands comprised in the litigation. The learned Judge understood the Full Bench decision as not being conclusive with respect to other villages forming part of the Tanjore Palace Estate. There was a Letters Patent Appeal against that decision wherein the view taken by Phillips, J., was confirmed.

In an earlier Judgment reported in *Raja Ram Rao* v. *Sundaram Iyer*[2], Sankara Nair, J., had to consider the nature of Vennur Ramaswami Thottam which formed part of the Tanjore Palace Estate. Accepting the finding of the lower Court that both the warams have been admittedly in the enjoyment of the Ranees who were the grantees under the grant of 1862 he held that the lands in question could not come within the definition of "estate" in section 3 (2) of Act I of 1908.

Krishnan, J., in an observation in *Nallauthu Padayachi* v. *Srinivasa Iyer*[3], seems to have interpreted the Full Bench decision as laying down that the whole of the Tanjore Palace Estate was an estate under the definition in section 3 (2) (*d*) of the Estates Land Act but there is no discussion about the merits of the question.

Succession to the Tanjore Palace Estate had been the subject of litigation which came up to the High Court in the case reported in *Maharaja of Kolhapur* v. *Sundaram Iyer*[4], and there are observations in the judgment of both the learned Judges with regard to the nature of the holding of these 199 villages. Though the point in dispute in that litigation related to the claims of rival heirs the history of the Tanjore Palace Estate had been considered by the learned Judges. Spencer, Offg. C.J., at page 25, remarks that he was unable to follow the learned Judges in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[5], in their conclusion that what was relinquished at the time in 1862 was a grant of grace and favour than a restoration of the property to those entitled to it by right of succession. The learned Judges seemed to think that the regrant meant to restore to the parties the rights which were in the property at the time of seizure. This case is important only in this respect, that is, that it was not definitely taken for granted that the relinquishment was a regrant. The other learned Judge, Kumaraswami Sastri, J., at page 98, after quoting the letter from the Secretary to the Government of India, Foreign Department, to the Chief Secretary to the Government of Madras, dated 23rd June, 1862, discussed the matter at pages 113 and 114 and expressed the opinion that though the relinquishment made by virtue of the seizure in the professed exercise of the sovereign rights may have the effect of a fresh grant, still the position when the Government resolved to relinquish the property was to give it back to the heirs of the Rajah, that is to say, to the persons who would have taken the property on the death of the Rajah had there been no seizure. There is a definite pronouncement as regards the rights conferred by the letter of relinquishment. The decision of their Lordships of the Judicial Committee in *Chota Raja Saheb* v. *Sundaram Iyer*[6], which confirmed the decision in *Maharajah of Kolhapur* v.

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[1] (1917) 33 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.).

[2] (1910) 8 M.L.T. 350.

[3] 1924 M.W.N. 378.

[4] (1924) 48 Mad. 1.

[5] (1868) 3 M.H.C.R. 424.

[6] (1936) 71 M.L.J. 41 : L.R. 63 I.A. 224 : I.L.R. 59 Mad. 633 (P.C.).

Sundaram Iyer[1], does not contain any specific opinion regarding the nature of the regrant.

After the decision in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[2], the next time when the nature of the estate was considered in the reported decisions was in *Srinivasa Iyer* v. *Nallamuthu Padayachi*[3], by Walter and Madhavan Nair, JJ., and in their order calling for a finding the learned Judges stated that the lower appellate Court in that case misunderstood the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer*[4], as referring to the whole of the Palace Estate and not to one village alone and directed the Subordinate Judge to submit a finding whether the disputed lands were a village as contemplated in section 3 (2) (*d*) of the Estates Land Act or whether apart from the Act the defendant had any occupancy rights. The reasoning of that case shows that the relinquishment in 1862 restored the anterior rights of the parties and since at the time of seizure the Rajah was entitled to both the warams the lands in question did not form an estate within the meaning of section 3 (2) (*d*). The impression that can be gathered from this judgment is that if both the warams vested in the Rajah with regard to any particular village then the relinquishment or regrant would not deprive the landlord of those rights. Though, therefore, they understood the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer*[4], as referring only to a particular village it was considered necessary to find out the nature of the rights in each of the villages separately. Venkataramana Rao, J., delivering the judgment of the Bench in the case reported in *Jagannatha Pillai* v. *Ramanathan Chettiar*[5], understood the Full Bench decision as containing a general finding with regard to the whole estate. After referring to the earlier judgments it was observed that if the Full Bench decision is to be given full effect there could only be one answer and that is, the village in question was an estate. Despite that expression of opinion the learned Judge discussed the evidence regarding it for coming to the conclusion that it was an estate. One thing is clear and that is that despite a disposition on the part of the learned Judges to take the view that the Full Bench decision laid down a general proposition that the villages comprised in the Tanjore Palace Estate would be 'estate' within the meaning of section 3 (2) (*d*) of the Estates Land Act, still they considered it necessary to discuss the evidence regarding each village as and when it came up for consideration to find out whether the Full Bench decision can correctly be applied to that. The learned Judges also relied on the fact that the Full Bench decision will not be binding upon the parties other than those who were before the Court in that case. The Privy Council had to consider the nature of the properties in *Secretary of State for India* v. *Thinnappa Chettiar*[6], with regard to the village of Someswarapuram comprised in the Tanjore Palace Estate when considering the applicability of the Madras Irrigation Cess Act (VII of 1865) to that village. Sir Madhavan Nair, who delivered the judgment of the Judicial Committee, referred to the history of the grant at pages 233 and 234 in *extenso* and formulated the question whether the Tanjore Palace Estate which came into being as a result of the grant by the Government on 21st August, 1862, constituted an engagement with the Government entitling the grantees to take water for free irrigation. The contention put forward on behalf of the Government was that the grant of the village conveyed to the holders of the Tanjore Palace Estate only the right to collect full land revenue, that is, melwaram due on the lands and that it did not constitute an assignment of the land. The discussion at pages 239 to 241 of this judgment indicates that the relinquishment in 1862 restored to the grantee full proprietary rights over the properties but their Lordship held that they were not called upon to express an opinion as to whether the villages are estates within the meaning of the Madras Estates Land Act. Though the decision in *Sundaram Iyer* v. *Ramachandra Iyer*[4], was cited before them the correctness of it had not been adjudicated upon in the judgment. The word 'relinquishment' has been interpreted as restoration of the private property of

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1. (1924) I.L.R. 48 Mad. 1.
2. (1868) 3 M.H.C.R. 424.
3. A.I.R. 1928 Mad. 1245.
4. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.).
5. (1938) M.W.N. 1284.
6. (1943) 2 M.L.J. 382 : L.R. 70 I.A. 112 : I.L.R. 1944 Mad. 227 (P.C.).

the Rajah to his heirs in all its integrity and without any reservation of any kind of right in favour of the Government. That the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1], had not even the implicit approval of their Lordships is sufficiently obvious and it seems to us that if it were necessary to decide whether the 199 villages are estates within the meaning of section 3 (2) (*d*) of the Estates Land Act the Judicial Committee might have taken a different view. They refer to the decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1], for the purpose of remarking that the grant was an irresumable one and conclude that having regard to the nature of the grant of 1862 the Tanjore Palace Estate, if treated as an inam must be treated as a peculiar kind of inam and the estate appears commonly to have been spoken of as a Mokhasa grant which it is not. There was also an underlying implication to treat these villages as the private property of the Rajah. But one thing is abundantly clear and that is having in more than one place referred to the decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1] and also having considered the question as to whether the land revenue alone had been granted without the kudiwaram rights by the grant of 1862, the Privy Council has expressly refrained from approving of the correctness of the decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1].

Then again the history of the nature of the Tanjore Palace Estate has been noticed by Wadsworth, Offg. C.*J.*, in *Jagadeesam Pillai* v. *Kuppammal*[2], when considering whether Kaduveli village forming part of the Tanjore Palace Estate had become an estate by reason of the Madras Estates Land (Third Amendment) Act XVIII of 1936. Adverting to the Full Bench decision in *Sundaram Iyer* v. *Ramachandra Iyer*[1], the learned Judge observed that it was not necessary to determine whether or not the village of Kaduveli formed an estate within the definition of the Estates Land Act as it stood before the amendment of 1936. The learned Judge observed at pages 700 and 701 as follows :

> " The Full Bench which decided *Sundaram Iyer* v. *Ramachandra Iyer*[1], answered in the affirmative the question whether the Tanjore Palace Estate was an estate under the Madras Act I of 1908. This decision has in some cases been distinguished on the ground that only one village was then under the consideration of the Court ; but in terms the answer of the Full Bench appears to include the whole of the estate. There is much to be said for the view that, when the grant is considered as a whole, it must be regarded as a grant of the land revenue to a person not owning kudiwaram in the lande although it can be shown that in the case of individual lands in the estate the kudiwaram interes- which had been previously owned by the Rajah was included in the rendition to his heirs. What ever be the effect of the application of the Madras Act I of 1908 to this estate all doubt is removed by the passing of the Amending Act in 1936."

In regard to Nadhupadugai Melpathi one of the villages forming part of the Tanjore Palace Estate this Court decided following *Sundaram Iyer* v. *Ramachandra Iyer*[1], that it was an estate under the Madras Estates Land Act for the reason that all the villages pertaining to the Tanjore Palace Estate were granted in inam by the Government to the heirs of the Rajah of Tanjore. The learned Judges, Subba Rao and Panchapakesa Ayyar, JJ., in *Abdul Rahim* v. *Swaminatha*[3], interpreted the Full Bench decision as direct authority for the conclusion that the entire body of the villages pertaining to the Tanjore Palace Estate should be held as inams. They refer to the earlier decicions which we have considered above in which this question came up for consideration including *Jagadeesam Pillai* v. *Kuppammal*[2], and distinguished *Nallamuthu Padayachi* v. *Srinivasa Iyer*[4], and *Srinivasa Iyer* v. *Nallamuthu Padayachi*[5], followed *Jagannatha Pillai* v. *Ramanathan Chettiar*[6], and held affirmatively that the Full Bench decision was authority for holding that the entire Tanjore Palace Estate is an estate within the meaning of section 3 (2) (*d*) of the Act. It has to be noticed that though this judgment was pronounced on the 4th February 1954, no reference has been made in the

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1. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389 (F.B.).
2. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687 at 689 and 690.
3. (1955) 1 M.L.J. 322 : I.L.R. (1955) Mad. 744.
4. 1924 M.W.N. 378.
5. A.I.R. 1928 Mad. 1245.
6. 1938 M.W.N. 1284.

judgment to the decision in *Secretary of State for India* v. *Thinnappa Chettiar*[1]. The decree and judgment of Subba Rao and Panchapakesa Ayyar, JJ., are now pending in appeal before the Supreme Court as a result of leave granted by Panchapakesa Ayyar and Basheer Ahmed Sayeed, JJ., in S.C.C.M.P. Nos. 6623 and 6625 of 1954 by their order, dated 25th February, 1955, in which Panchapakesa Ayyar, J., has observed that the ruling in *Secretary of State for India* v. *Thinnappa Chettiar*[1], was not cited before Subba Rao and Panchapakesa Ayyar, JJ., and therefore the question involved is of sufficient importance to be taken to the Supreme Court.

A Bench to which one of us (Govinda Menon, J.) was a party noticed the conflicting decisions as considered above in S.A. No. 1513 of 1948 and observed that in the state of authority it was unnecessary to express any opinion regarding the entire estate and confined the decision only to the question as to whether the hamlet under consideration, Pattiswaram Thattimalapadugai, a part of Thenampadugai, is an estate within the meaning of Act XVIII of 1936 and on the evidence it was found that it was an estate. In his order calling for a finding in S.A. No. 2465 of 1948 on the 19th March, 1953, Satyanarayana Rao, J., has also discussed all the cases and he was inclined to take the view that the decision in *Secretary of State for India* v. *Thinnappa Chettiar*[1], has not, in fact, cast a doubt on the wide proposition laid down in *Sundaram Iyer* v. *Ramachandra Iyer*[2], and in regard to lands which were under consideration in that litigation, he held that it was an estate within the meaning of the Estates Land Act. A finding was called for from the lower appellate Court as to whether the lands in question were private lands and not ryoti lands and the Deputy Collector, Kumbakonam, submitted a finding that the lands were not ryoti and hence the plaintiff was not entitled to get any patta under section 55 of the Estates Land Act. That finding was accepted by this Court by one of us (Govinda Menon, J.). Raghava Rao, J., in S.A. No. 2343 of 1947 took the view while agreeing with the decision in *Srinivasa Iyer* v. *Nallamuthu Padayachi*[3], that it cannot be said that every piece of land situated in any village in the Tanjore Palace Estate can be regarded as an estate within the meaning of the definition and that evidence must be gone into to decide whether any particular village had both the warams or not. It is pertinent to remember that the land in question in that second appeal was situated in the Pannimangalam village which has been considered as a whole inam village by the learned Judge. The disputed lands in these appeals which we are now considering are in Orathur padugai which is also a part of Pannimangalam village.

Mr. T. M. Krishnaswami Iyer for the respondents urges that even if at the time of the seizure the 199 villages formed part of the private estate of the Rajah of Tanjore in which he held both the warams by the very nature of the reliquishment or regrant it has not revived the old state of things and, therefore, the rights of the parties should be decided as and from the grant itself which according to the learned counsel can only be that when the sovereign makes a grant it is only in respect of the right to collect revenue and, therefore, the grantee is entitled only to melwaram right alone. It is argued that since the restoration of the lands was a grant by the Crown a construction most strictly against the grantee and more beneficial to the Crown should be adopted and if so nothing will pass to the grantee but by clear and express words. He relies upon certain pronoucements which show that after there has been a confiscation, seizure or exchange or regrant either to the heirs of the original owner or to third parties the only inference that can be drawn is that the grant conveyed nothing but the right to collect the revenue and the new title conferred should naturally be deemed to be on the terms of the grant. The question which their Lordships of the Judicial Committee had to consider in *Nawab Nalka Jahan Sahiba* v. *Deputy Commissioner of Lucknow*[4], was with respect to the effect of confiscation of certain properties as a result of the Mutiny in 1857 and the consequent regrant to the former owners. Their Lordships held that the effect of Lord Canning's proclamation of the 15th March, 1858, was to divest all the landed property from the proprietors in Oudh and to transfer it to and vest it in the British Government. Consequently all who since that day claimed title to such property must claim through the Government. Where the regrant is made to a former owner the new title will depend entirely on the terms of the regrant and if such regrant is made for life only no suit can be maintained to rectify the alleged mistake. There cannot be any resuscitation or revival of the old things. At page 74 we find the following observations :

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[1] (1943) 2 M.L.J. 382 : L.R. 70 I.A. 227 : I.L.R. (1944) Mad. 112 (P.C.).

[2] (1917) 32 M.L.J. 333: I.L.R. 40 Mad. 389.

[3] A.I.R. 1928 M. 1245.

[4] (1879) L.R. 6 I.A. 63 (P.C.).

> "Those rights, whatever they were, were confiscated and the sole question is what interest, if any was regranted to her. Looking at the whole of the proceedings which have been concluded, it appears to their Lordships abundantly clear that no more was granted to her than a permission to occupy the palace for her life. If the acts which she seeks to impugn on the part of the officers of the Government were nullities it would follow she has no interest at all but that her property remains in the British Government to which it was confiscated."

From this it is urged that we have to look at the substance of the regrant and nothing more. Another case on which great reliance was placed was *Sirdhar Bhagwan Singh* v. *Secretary of State for India*[1], which held that seizure by right of conquest must be regarded as an act of State and is not liable to be questioned in a municipal Court, following *The Secretary of State in Council of India* v. *Kamachee Boye Sahiba*[2]. The observation at page 44 regarding the effect of certain directions to the East India Company after the conquest of Punjab which was contemplated to make what may be called a *tabula rasa* of tenures of a particular kind and to regrant them upon terms entirely at the discretion of the British Government were relied upon. It is, no doubt, true that in more than one place the judgment refers to the effect of regrant but we are not able to find much analogy between that case and what we have to consider. Learned counsel also brought to our notice the decision in *Vajesingji Joravarsingji* v. *Secretary of State for India in Council*[3], which also dealt with the question of seizure of certain lands. The next case cited was the well known case *Cook* v. *Sprigg*[4], where the Judicial Committee held that where the British Crown annexed certain lands such annexations being an act of State any obligation assumed under a treaty to that effect either to the ceding sovereign or to individuals is not one which municipal Courts are authorised to enforce, following *The Secretary of State in Council of India* v. *Kamachee Boye Sahiba*[2].

The other cases on which the learned counsel relies are *Secretary of State* v. *Bai Raj Bai*[5], and *Rahas Behari Lal* v. *Kanhaiya Lal*[6]. In the earlier case it was held that if before the ceding of any territory to the British Crown by a feudatory prince there had been any legal subsidiary rights created in others by such a prince such rights cannot exist after the cession. The only legal enforcible rights are those which by agreement express or implied or by legislation the new sovereign chose to confer upon them, following the *Secretary of State in Council of India* v. *Kamachee Boye Sahiba*[2], and *Cook* v. *Sprigg*[4]. There are observations in *Rahas Behari Lal* v. *Kanhaiya Lal*[6], in practically the same strain. It is not necessary to discuss that case in great detail. We may also refer to *Secretary State* v. *Rustom Khan*[7].

Mr. T.M. Krishnaswami Iyer further contends that according to certain observations in *Sundaram Iyer* v. *Ramachandra Iyer*[8], the 199 villages could not have been the private estate of the Rajah but must have been the adjuncts of his sovereignty and whatever might be the reason for his retention of these villages after the cession of the Tanjore Raj when once they are seized by the East India Company on behalf of the British Crown all the previous tenures and rights that existed must be deemed to have been wiped out and that the grant of 1862 should be considered as opening a new chapter and writing on a clean slate. If that is so, it could not be that by the regrant both

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1. (1874) L.R. 2 I.A. 38 (P.C.).
2. (1859) 7 M.I.A. 476.
3. (1924) 47 M.L.J. 574 : L.R. 51 I.A. 357 : I.L.R. 48 Bom. 613 (P.C.).
4. L.R. (1899) A.C. 572.
5. (1915) 29 M.L.J. 242 : L.R. 42 I.A. 229 : I.L.R. 39 Bom. 625 : A.I.R. 1915 P.C. 59 (P.C.).
6. A.I.R. 1940 Oudh 289.
7. (1941) L.R. 68 I.A. 109 : I.L.R. Kar. P.C. 94 : A.I.R. 1941 P.C. 64 (P.C.).
8. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389.

the warams could in any event have been granted to the successors of the Rajah. He particularly refers to the concession made by the counsel in *Sundaram Iyer* v. *Ramachandra Iyer*[1], that the kudivaram interest did not belong to the estate at all. This is made clear from the arguments of the learned counsel in that case. Sadasiva Iyer, J., at page 399 in *Sundaram Iyer* v. *Ramachandra Iyer*[1], refers to the new grant as of Government revenue alone. In these circumstances the learned counsel contends that the kudiwaram rights could never have passed to the grantees. In our view, *Sundaram Iyer* v. *Ramachandra Iyer*[1], cannot be understood as laying down a conclusive decision that all the villages constituting the Tanjore Palace Estate are estates within the meaning of section 3 (2) (*d*) of the Estates Land Act in that only melwaram alone vested in the Rajah. Even in all those cases where the Full Bench decision is understood as laying down a general law evidence was gone into to find out whether the kudivaram right vested in the tenants. *Jagannatha Pillai* v. *Ramanathan Chettiar*[2], *Abdul Rahim* v. *Swaminathan*[3], and S.A. No. 2465 of 1948 reveal the fact that the learned Judges who decided each one of them did not proceed to base their conclusion on the Full Bench decision alone.

It is, therefore, clear that because the Tanjore Palace Estate consisted of a number of villages it is not right to treat the entire estate itself for the purpose of the definition of the Madras Estates Land Act as one single inam village falling within the provisions of section 3 (2) (*d*) of the Act so that whatever land is situated within any of the villages comprised in the estate would necessarily be land situated within the estate under the Estates Land Act. But one thing is clear and that is, that none of the decisions regarding any of the villages comprised in the Tanjore Palace Estate has so far, decided that the entire area comprising the 199 villages belonged to the Rajah as his private property, that is property, situated in the ryotwari area paying land revenue to the Government. In *Secretary of State for India* v. *Thinnappa Chettiar*[4], their Lordships of the Judicial Committee treated the grant as an inam of a peculiar kind and there was no question of treating the same as the private property of the Rajah. Though therefore, there are expressions of opinion here and there in some of the judgments to the effect that the lands were originally the property of the Rajah, still we have to take it that the restoration or relinquishment or regrant should be considered to be the root of a new title.

Such being the case, the issue has to be decided on the evidence as to whether the plaintiff in each of these suits is entitled to both the warams. Learned counsel for the appellant brought to our notice that the lands in question are not comprised in a whole inam village as there has been no grant as such but that they are grazing fields or padugais without any human habitation and without any village site and argued that such being the case, it cannot be said that there was a grant of the village. We shall deal with this aspect of the case later on.

But before doing so, it is necessary to advert to the argument that the lower Court has thrown the onus of proof wrongly in putting the burden on the plaintiff to show that he has a right to eject the tenant. The complaint is that in more than one place the learned Subordinate Judge has proceeded on the footing that the plaintiff has not discharged that onus that lies on him to prove that the lands in question are private lands. See the beginning of paragraphs 29 and 35 and the end of paragraphs 40 and 41 of the lower Court's judgment. It is no doubt, true that the learned Subordinate Judge has dealt with the question of the burden of proof in the manner stated but he has also gone into the evidence before coming to the conclusion though not as elaborately as should have been the case. According to Mr. Kesava Iyengar, under section 9 of the Civil Procedure Code a civil Court has got the right to adjudicate a civil dispute which is within the pecuniary and territorial jurisdiction of that Court and any party that denies that jurisdiction should affirmatively prove it. Learned counsel suggests that the view taken by the learned Subordinate Judge on the question of burden of proof is tantamount to a denial of the jurisdiction of the Civil Court to hear the suits. We do not think that there is any question of jurisdiction involved in these cases. What has to be considered is whether in the circumstances of the case the burden of proof is on the plaintiff or not. A large body of case law has been cited at the Bar but in our view there is no such cut and dry element of proof. It is urged that if the lands in question are part of an estate then since under the Madras Estates Land Act a suit for ejectment is not maintainable in a civil Court, the defence put forward amounts to an ouster of jurisdiction and, therefore, the party seeking to oust the jurisdiction of the civil Court must establish his right to do so. In that case the burden will be on the defendant. See the decision in *Srimath Jagannathacharyalu* v. *Kutumbarayudu*[1]. The observations in the well known case in *Naina Pillai Maracair* v. *Ramanathan Chettiar*[2], where their Lordships held that it is for the defendants, tenants, to prove that they had the right of occupancy under the Estates Land Act where the title of the landlord had been admitted was specifically relied upon. Various passages from that judgment where the matter is discussed were brought to our notice. The decision in *Srimath Jagannathacharyalu* v. *Kutumbarayudu*[1], was accepted by the Judicial Committee in *Ramayya* v. *Lakshminarayana*[3]. At page 452 their Lordships say that the burden is on the party who maintains that the general rule namely, section 9, Civil Procedure Code is not applicable. Our attention was also drawn to the decision of the Supreme Court in *The District Board, Tanjore* v. *Noor Mohomed Rowther*[4], where Mahajan, J., refers to the fact of the late Mr. Somayya, learned counsel for the tenants in that case conceding that the burden of proof that certain lands constituted an estate is upon the party who sets up that contention. At page 104, Chandrasekhara Aiyar, J., also considers that the burden is on the tenant to establish that what was originally granted was an estate. Raghava Rao, J., refers with regard to the burden of proof in similar terms in *Ramamurthi Sastri* v. *Ammanna*[5]. Moreover in *The District Board, Tanjore* v. *Noor Mahomed Rowther*[4], their Lordships cited with approval the judgment of this Court in *Janakirama* v. *Gopalan*[6]. *Ramayya* v. *Lakshmi Narayana*[3], and *The District Board, Tanjore* v. *Noor Mahomed Rowther*[4], were relied upon by Satyanarayana Rao, J., for holding that the burden of establishing the nature of the occupancy rights is undoubtedly on the tenants who claim them.

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[1] (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 839 (F.B.).

[2] (1938) M.W.N. 1284.

[3] (1955) 1 M.L.J. 328 : I.L.R. (1955) Mad. 744.

[4] (1943) 2 M.L.J. 382 : L.R. 70 I.A. 112 : I.L.R. (1944) Mad. 227 (P.C.).

On the other hand we were pressed with the authority of the Privy Council in *Lakshmanna* v. *Venkateswaralu*[7], where the Judicial Committee held that in a suit by a holder of a minor inam to evict the tenant from the holding the burden is on the plaintiff to make out the right to evict by proving that the grant included both the melwaram and the kudivaram interests or that the tenant or his predecessors were let into possession by the inamdar under a terminable lease. Their Lordships distinguished the case in *Naina Pillai Maracair* v. *Ramanathan Chettiar*[2], by stating that the decision does not contravene the principle that in a suit for ejectment the burden lies on the inamdar as plaintiff to prove his right to evict and is not inconsistent with the decision in *Chidambara* v. *Veerama Reddi*[8]. Their Lordships further held that the judgment in *Naina Pillai Maracair* v. *Ramanathan Chettiar*[2], read as a whole does not support the conclusion that the proposition of law laid down therein as regards the burden of proof is a general proposition. The discussion at pages 577 and 578 was specifically relied on.

In the present case we do not wish to rest our decision merely on the principle of the burden of proof. Elaborate evidence has been let in on both sides and our conclusion will be based on the analysis of that evidence and not merely on the academic question regarding burden of proof for as has been remarked very often by the Courts of the highest authority when once the entire evidence is before the Court the onus of proof is only a matter of minor interest as the case has to be decided mainly on the evidence. If the village in question is a minor inam then the decision of the Privy Council in *Lakshmanna* v. *Venkateswaralu*[1], will be applicable. If on the other hand it is an estate as claimed by the defendants the Supreme Court decision in the *District Board, Tanjore* v. *Noor Mahomed Rowther*[2], will be applicable. Under these circumstances the question we have to decide is whether the village of Orathur padugai is an estate or not.

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[1] (1914) 27 M.L.J. 233 : I.L.R. 39 Mad. 21 and 24.

[2] (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47Mad. 337 (P.C.).

[3] (1934) 67 M.L.J. 1 : L.R. 61 I.A. 177 : I.L.R. 57 Mad. 443. (P.C.)

[4] (1952) 2 M.L.J. 586 : 65 L.W. 98, 99 and 104 (S.C.).

[5] (1950) 2 M.L.J. 442 at 447.

[6] (1951) 2 M.L.J. 272.

[7] (1949) 2 M.L.J. 500 : L.R. 76 I.A. 202 : I.L.R. (1950) Mad. 567 (P.C.).

[8] (1922) 43 M.L.J. 640 : L.R, 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).

The question of the nature of the lands in dispute has to be viewed in two aspects and they are firstly whether Orathur padugai is an estate and secondly even assuming that the lands are situated in an estate whether they are private lands and not ryoti lands. If it is the former, the plaintiff is entitled to succeed and if it is the latter, the suits will have to be dismissed.

In order to establish that the lands lie in an estate which admittedly is in the nature of an inam, we have to find out firstly whether there is a grant of an inam and thereafter whether such a grant is a grant of the whole village . In this case there is no documentary evidence in regard to the grant. Nor is there anything to show the nature of the inam. But from certain earlier documents a contention is put forward that there was no grant of the lands as such. Exhibit A-128 dated 6th April, 1800 is a letter to the Secretary to the Government, Madras, from the Resident of Tanjore with regard to the arrangement for the case and comfort of the Rajah who had ceded his territory to the East India Company. There is reference to Pannimangalam in which according to the plaintiffs the present Orathur padugai is situate. The statement there is that the fields of Pannimangalam to the westward of Tanjore which from time immemorial have been reserved for the pasture of the circar cows (Rajah of Tanjore)remained in the Rajah's possession. There is neither village nor cultivation on these lands. In answer to this letter a communication from the Chief Secretary to the Government to the Resident of Tanjore, Exhibit A-129, dated 5th July, 1800, was sent and in paragraph 5 of that letter it is stated that the fields of Pannimangalam containing neither village nor cultivation shall remain in the hands of the Rajah for the pasturage of His Excellency's cows. From this, it is argued that whatever might be the present condition of the lands in question, in 1800 they were merely pasture lands without any kind of habitation, intended for the grazing of the Rajah's cattle. On the other hand, Mr. T.M. Krishnaswami Iyer contends that in Exhibits A-128 and 129, Pannimangalam is described as situated to the westward of Tanjore whereas the exact location of these lands is admittedly not westward of Tanjore town and the cattle belonging to the Rajah could not have been grazed in the lands which are situate at least thirty miles away from Tanjore town, in Mannargudi taluk.

Even with regard to the name given to the fields there seems to be some difference between Exhibits A-128 and A-129, in the former document the description is Pannimangalam whereas in the letter it is Pucanyamangalam. It is, therefore, difficult so contends the learned counsel for the respondents, to fix the identity of the properties referred to in Exhibits A-128 and A-129 as the disputed lands. Moreover, the fact that the Rajah was allowed to keep the Strotrium village and adjust two hundred pagodas being the income from that village towards Mokhasa, one fifth of the revenue due to him, shows that the fields of Pannimangalam were not considered as productive of any income for, if that had been the case, some deduction should have been made towards that also. Learned Counsel for the respondents urges that the fields of Pannimangalam or Pucanyamangalam referred to in Exhibits A-128 and A-129 could not, therefore, be padugai lands in Mannargudi taluk but may refer to the high level pasture lands now seen to be situated to the west of Tanjore town through which the railway lines pass. That there was Orathur village in existence even as early as 1830 is clear from Exhibit A-151 because in describing certain boundaries of another village it is mentioned as to the north of assessed Orathur village Nadappukarai (bund pathway). It is clear that there was a village by the name of Orathur and that was assessed. That being the case as early as 1830, it seems that the village was not a grazing ground. The other documents in the case show that from 1880 up to the present day there is no doubt, that Orathur padugai village in Pannimangalam vattam is an independent entity paying assessment and has never been considered as pasture ground. That the word vattam refers to a group of villages is now clear and Pannimangalam vattam, therefore, consists of a number of villages of which Orathur padugai is one. If, therefore, these lands were never considered as pasture lands it could not be that the properties referred to in Exhibits A-128 and A-129 are identical with the disputed lands. Emphasis is laid on the fact that the Orathur village had been assessed as early as 1830 and that it is situate in Mannargudi taluk and not to the west of the Tanjore town. The inference is, therefore, possible that the fields referred to in Exhibit A-128 and A-129 do not refer to these lands. In this connection it has to be mentioned that these two documents are printed sheets of paper containing no signatures nor even stating that they are true copies of the originals certified as such by anyone. We have examined these documents in question, with a view to find out their nature and, though there is no reason to cast any suspicion upon the genuineness of these documents from a strictly legal point of view, it would seem that they cannot be admitted in evidence as there is no certification of the true nature of the copies. From the very nature of things, these documents cannot be the originals and it is not pretended that they are such. We, therefore, feel that Exhibits A-128 and A-129 cannot help the case of the appellant to show that the lands in question are the private lands of the Rajah. If even they are considered as assessed lands as early as 1830, they should have become the public property belonging to the sovereign state of Tanjore over which the Rajah exercised his suzerainty and could not be his private property and if the entire Raj had been handed over to the East India Company under the treaty they continued to have the same features attached, such as liability to pay Government revenue out of which one-fifth was paid over to the Rajah. There is, nothing, therefore, to show that the character of these lands as Raj would not have continued till 1855 when seizure took place.

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[1] (1949) 2 M.L.J. 500 : L.R. 76 I.A. 202 : I.L.R. (1950) Mad. 567 (P.C.).

[2] (1952) 2 M.L.J. 586 : 65 L.W. 98 (S.C.).

We shall discuss the point regarding whether Orathur padugai was at least from 1830 recognised as a whole inam village at a later stage, but before doing so, it is necessary to refer to various documents on which Mr. Kesava Ayyangar relied to show that the lands in question were lands over which the Tanjore Palace Estate had absolute domain. What he contends is that because there is no entry in the Huzur inam register relating to Orathur Thottam of Pannimangalam vattam, Mannargudi taluk, as is seen from Exhibit A-150, it must be taken that the padugai in question is not a village and, if that is so, what was granted was not a whole village but only a block of lands, and therefore, according to the decision of *Bavanarayana* v. *Venkatadu*[1], they cannot form an estate. Great reliance is placed upon Exhibit A-147 dated 25th August, 1930 which is an abstract showing the paimash land measurement in Orathur thottam, Sithamalli Keelpathi vattam, Nidamangalam firka, Mannargudi taluk, for fasli 1240. In considering the measurements the description is given as Orathur thottam dittam. There are recitals to the effect that in the thottam, there are forests and that by way of grass tax, mattu thotti, ilandai fruit lease and fire wood the palace gets an annual income of Rs. 50. In the above thottam natham kudiyeruppu (village site, residential quarters do not exist). The four boundaries are also given and the thottam is described as *ekhabhogam thottam*, that is, thottam in which the proprietorship vests in the owner. According to the appellant this document would show that the Rajah was the sole owner of the lands and there was no grant whatever of a village. We are asked to say that by a combined reading of Exhibits A-128, A-129 and A-147 the Orathur thottam was the private estate of the Rajah. We have already stated that Exhibits A-128 and A-129 do not refer to the suit lands and with regard to Exhibit A-147 the recitals there are not conclusive.

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1. (1953) 2 M.L.J. 748 : I.L.R. (1954) Mad. 116 (F.B.).

That, up to 1875, there was no cultivation as such in Orathur padugai is sought to be established from Exhibits A-8 to A-10 of which Exhibit A-8 dated 17th August, 1872 is a lease muchilika executed by a tenant for having taken these lands for the purpose of grazing cattle and for cutting grass for a term of five years from fasli 1282 to 1286. The description of the leased property is Periakadu Orathur Siddhamalli padugai attached to Mokhasa Pannimangalam Thattimal and the lessee agrees to surrender the property after a period of five years. Exhibits A-9 and A-11 are D.C.B. accounts for Orathur periakadu attached to Mokhasa Pannimangalam Thattimal and it is stated therein that the lands are padugai waste and the *beris* for cutting grass for a period of five years is Rs. 63 and there are other indications there to show that the lands were waste. Exhibit A-11 is also a similar D.C.B. account showing that the Orathur padugai was tharisu (waste). Similarly Exhibit A-10 is the Jamabhandhi account for Orathur periakadu attached to Pannimangalam Thattimal and that shows that it was waste land leased out for cutting grass for a period of five years. In all these documents there are indications to show that other than grass, by sale of certain kinds of fruits and withered trees, *etc.*, smaller sums of monies were realised. No doubt these four documents show that between 1872 and 1875 Orathur padugai consisted of waste lands also but in view of what is found in Exhibit A-151 that as early as 1830 some portions of the lands in Orathur village were assessed, nothing conclusive can be gathered from the fact that the other portions nearly half a century later were let out for pasture purposes.

Whether the Orathur padugai was an estate according to the definition of the term in section 3(2) (*d*) of the Estates Land Act as it originally stood or whether it becomes an estate by reason of the amendment introduced by the Madras Act XVIII of 1936 by which *Explanation* (1) was added will have to be considered next. According to the operative part of the section as it originally stood

> " any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government or any separated part of such village."

is an estate.

The amended section lays down

> " that any inam village of which the grant has been made, confirmed or recognised by the Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees."

is an estate.

By the *Explanation*, what is meant by a whole inam village is made clear and it is this :—

> " Where a grant is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes."

The argument advanced on behalf of the respondents is that Orathur padugai is a whole inam village according to unamended section 6 and in any event after the amendment by the Madras Act XVIII of 1936 the village is an estate under section 3(2) (*d*) and the *Explanation* thereto. In regard to the assessed nature of the lands in 1830 reference was already made to Exhibit A-147 and until 1880 it is alleged that Orathur padugai was regarded as a village in Pannimangalam Thattimal. Exhibit A-4 of 1868 which is a D.C.B. account relating to Orathur padugai attached to Mokhasa Pannimangalam Thattimal shows that there are irrigation areas under tank and thottam, nanja and punja lands. It is clear from this that the entire village except the waste lands was assessed. From Exhibit A-5 dated 4th September, 1870 it is seen that the punja lands in Orathur village were taken on lease from the Collector of Tanjore who was the receiver and manager of the Estate of the Raja of Tanjore for a period of five years on payment of a total sum of Rs. 122-9-3. Exhibits A-7, A-8, A-12, A-13, A-14 A-15 A-16 and A-18 are either adaiyolai muchilikas or lease deeds for the leasing of the lands in Orathur padugai village for a term granted by the Collector of Tanjore from which it is seen that they are agricultural lands on which crops were raised, and in all these documents the description is that the lands are situate in Orathur padugai in Mokhasa Pannimangalam Thattimal. They range between years 1870 to 1875. Exhibit A-16 contains a recital that for plantain cultivation one mah of land was assessed at Rs. 4-2-1 in addition to the other details of cultivation. That the tenants themselves were residing in Orathur village as such can be gathered from the description of the executants of the various Adaiyolais. See the description of the tenants in Exhibits A-21, A-22, A-23, A-30 and A-33 and all these were between 1874 and 1877. It is clear, therefore, that even at that period, the village contained human habitation. In Exhibit A-63 which is the individual-war settlement register for Pannimangalam vattam for fasli 1296 against column 6 it is stated that the income in the matter of the *amani* cultivation of sugarcane, etc., on 95 kullis is Rs. 4 and it is in Orathur padugai village, Pannimangalam vattam.That *amani* cultivation is waram cultivation has been laid down in *Varada Reddi* v. *Srinivasa Mudaliar*[1], Exhibit A-61 is the D.C.B. account of Orathur padugai, Mokhasa Pannimangalam Thattimal vattam for fasli 1294 and the entries there show the lands cultivated, *amani* income and various other details just like any other inhabited and cultivated village. Similarly in Exhibit A-64 the individual-war settlement register for Pannimangalam vattam, Mannargudi taluk, column 3 relating to the village of Orathur states that the Orathur padugai is a village and the vattam is Pannimangalam. Exhibit A-65 is the settlement register for Pannimangalam vattam for fasli 1297 wherein Orathur is described as a padugai and the total assessment remission for the previous fasli is Rs. 356-12-9. There can be no doubt that during all these years Orathur padugai was treated as a separate village. Paragraph 8 of Exhibit A-152 speaks about the repairing of the channel, etc., by the lessee stated to be residing in Orathur and the lease was for a period of seven years. Among the villages constituting the Pannimangalam vattam which is a group of villages the first place is given to Orathur padugai as is seen from Exhibit A-78 (*a*) the village-war settlement register of Pannimanagalam vattam. In Exhibit A-79 the village-war settlement register for Pannimangalam vattam for fasli 1309 the village of Orathur is described as Orathur padugai and is styled as a village and the particulars contained in column 2 speak of the lands as being to the north of Orathur limits. Exhibit A-80 is the individual-war jamabandhi register for Pannimangalam vattam for fasli 1309 and herein, Orathur padugai is described as a village. Exhibits A-80, A-82 and A-84 contain similar descriptions of the Orathur village in Pannimangalam vattam. Exhibits A-153, A-155 and A-157 are all lease deeds between the years from 1901 to 1906 relating to lease of lands in Orathur padugai. They contain a clause to the effect that in case the tenant plants any trees and rears them on the expiry of the lease they shall belong to the estate. Transactions such as lease entries in revenue accounts as well as other deeds referred to above and discussed show that the Orathur padugai is a separate village in a group of villages or vattam called Pannimangalam vattam. It will be noticed that from 1868 right up to 1907 Orathur padugai was considered as a separate village. The contention of the respondents is that prior to the Estates Land Act the village was considered as a separate one. That the same continued to be a separate village even after the passing of the Estates Land Act can be gathered from a number of other documents. The description of the lands as set out in Orathur padugai village, Mokhasa Pannimangalam vattam in Exhibit A-158 and in a number of other documents such as Exhibits A-98, A-104, A-105, A-159, A-106, A-116, A-161, B-17, A-117, A-118, A-119, A-120, B-18, A-121, A-162 and A-163 are strongly relied upon by the counsel for the respondents as justifying that even after the Estates Land Act, Orathur padugai was treated as a separate village. Exhibit B-20 series are receipts granted by the Receiver Tanjore Palace Estate to the father of the defendants ranging from 1930 to 1935 for having received payment of rent in respect of lands in Orathur village in Pannimangalam vattam. Exhibit B-27 series, B-22 series and B-10 series are similar receipts where description in the above manner that the village of Orathur is situated as a village in Pannimangalam vattam are contained. B-9 series and B-11 series contain similar descriptions. The other receipts are, Exhibits B-19, B-25 and B-28. The Receiver of the

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[1] (1923) 45 M.L.J. 199.

Tanjore Palace Estates executed conveyances of kudivaram rights after the passing of the Amending Act XVIII of 1936 to the various tenants and in those documents Orathur padugai is treated as a separate village. They are Exhibits B-6 and B-31 to B-33.

Under the decree in O.S. No. 44 of 1932 on the file of the Sub-Court, Madurai, a receiver had been appointed for the management of the Tanjore Palace Estate and that receiver auctioned out to the highest bidder permision to cultivate the lands in the various villages and thereafter muchilikas had been executed by the highest bidders for permission to cultivate. Notice of auction sale of lease had been printed and published. Exhibit A-130 is the list of proclamation of sale of lease of lands conducted by the receiver and in that document Orathur padugai is treated as a separate village. The names of the old lessees are also given in the last column. Similar auction notices are Exhibits A-132, A-135, A-138, A-137, A-140 and A-139. In some of these sale notices Orathur padugai is shown as a separate village situate in Pannimangalam vattam. The lease granted by the receiver in O.S. No. 44 of 1932 on the file of the Sub-Court, Madurai, dealt with this particular village in the same manner. In Exhibits B-7 and B-12 Orathur padugai is treated as a separate village. Subsequent notices of auction sale of lease, bidders' list as well as receipts where the village of Orathur padugai is treated as a separate village are Exhibits A-142, which is the bidders' list in the auction sale of lease, Exhibit B-29 which is a receipt granted by the receiver, Tanjore Palace Estate to the defendant in O.S. No. 30 of 1950, Saminatha Pandaryar and Exhibit A-141 which is the notice of sale, Exhibit A-143 which is the list of sale proclamation of sale of lands for fasli 1354, Exhibit A-144 which is the bidders' list, Exhibit A-146 the sale certificate and Exhibit B-5 deed of absolute sale of kudivaram rights—all these documents treated Orathur padugai as a distinct village. It is, therefore, contended on behalf of the respondents that during the earlier periods the Adaiyolai muchilikas and subsequently the leases from the Collector of Tanjore as receiver of the Tanjore Palace Estates and thereafter from the Court receiver show that Orathur was a separate village. We have also receipts from 1917, the D.C.B. accounts, the jamabandi accounts and the individual-war accounts showing that the village of Orathur was treated as a distinct village. From this the inference is possible that even the original grant was of a single village as is seen from the muchilikas. Water cess was always collected from the tenants which is a decisive factor in considering whether the kudivaram right vested in the tenants.

As against this line of argument the appellant has invited our attention to a large body of documents, mainly leases taken from the Receiver of the Tanjore Palace Estates wherein the lessees admit that they are bound to surrender the property at the expiration of the lease period. If the kudivaram right had vested in the tenants there could be no such agreement that the lands would be surrendered at the end of the lease period. So argues the learned counsel for the appellant. There are also recitals in the lease deeds that the lands in question did not form an estate within the meaning of Act I of 1908. As a typical instance reference may be made to Exhibit A-158 dated 7th October, 1909 which is a counter lease by one of the parties to the present litigation to the Receiver of Tanjore Palace Estates for a period of seven years from fasli 1319 to 1325 at the rate of Rs. 55-8-0 per fasli. Paragraphs 12, 16, 17, 21 and 23 of this document are important. In paragraph 21 it is stated that the lease does not come within the definition of the word " Estate" under the Madras Act I of 1908. Recitals in similar leases such as Exhibit A-159 paragraph 22, paragraph 25 in Exhibit 119 dated 24th July, 1919, paragraphs 16,17, 25, 28, 29, 31, 33 of Exhibit A-162 dated 9th February, 1923 and paragraphs 16, 17, 25 28 and 31 of Exhibit A-163 dated 25th September, 1923 are relied on for showing that the lessees agreed to surrender their leasehold rights at the expiry of the stipulated period and also for showing that they contained expressions that both the warams are vested in the landlord. In Exhibit A-131 the description ofthe property is to the effect that the land belongs to the Tanjore Palace Estate which possesses both the warams and that it does not come within the definition of an estate under Act I of 1908. Particular stress is laid on the fact that the lessees are some of the defendants in the suits. There are other exhibits wherein the tenants admit that both the warams are vested in the Tanjore Palace Estate and also that the lands do not come within the purview of Act I of 1908. They are Exhibits, A-135, A-137, A-139, A-141, A-143 and A-144. Learned counsel for the appellant points out that special importance should be attached to the agreements contained in documents subsequent to 1936 wherein the tenants have admitted that the lands do not come within the ambit of Act I of 1908 for the reason that if in fact they had occupancy rights at least after the passing of the Amending Act XVII of 1936 it would be impossible to have such recitals in the various documents. The answer given by the respondents counsel is that in most of these sales the bidders are the old tenants and they would not have cared about what recitals were contained in the lease deed so long as their possession on lease was not disturbed. In this connection Mr. T.M. Krishnaswami Iyer has analysed the various documents to show that one and the same individuals continued to be the purchasers at the various auctions ; for example Ganes Iyer defendant in O.S. No. 78 of 1949 and respondent in A. S. No. 279 of 1952 is a party to Exhibits B-10, B-11 and B-12 and he has proved Exhibits A-130, A-132, A-135, A-137, A-139, A-141, A-143 and A-144 as D.W. 2. Similarly Sevu Servai defendant in O.S. No. 79 of 1949 and respondent in A.S. No. 264 of 1952 is connected with Exhibits B-18 and B-19 and is a purchaser in auction-sale evidenced by Exhibits A-130, A-132, A-135, A-137, A-139, A-141 and A-143 and it has to be remembered that Kathan Ambalagaran is the elder brother of Sevu Servai whose name appears in some of these transactions. Similarly Singara Solagar defendant in O.S. No. 80 of 1949 and respondent in A.S. No. 265 of 1952 is connected with Exhibits B-20 and B-21 and is the auction-purchaser of the leases in Exhibit A-130, A-132, A-135, A-137, A-139, A-141, A-143 and A-144. He was examined as D.W. 4. Nataraja Pillai and others, defendants in O.S. No. 81 of 1949, respondents in A. S. No. 266 of 1952 are connected with Exhibits B-22 and the auction sales evidenced by Exhibits A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Nataraja Pillai was examined as D.W. 3. Srinivasan Pillai defendant in O.S. No. 21 of 1950 and respondent in A.S. No. 269 of 1952 is a lessee of one acre 10 cents of land in S. No. 38 and is the purchaser in auction evidenced by Exhibits, A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Sivasami Thevar and Vadivelu Thevar are defendants in O.S. No. 25 of 1950, respondent in A.S. No. 272 of 1952 and are connected with the auction sales evidenced by Exhibits A-130, A-132, A-135, A-137, A-139, A-141 and A-143. Kumaraswami Manniar defendant in O.S. No. 24 of 1950 and respondent in A.S. No. 271 of 1952 is connected with the auction sales evidenced by Exhibits, A-137, A-139 and A-141 and A-148. Sivasankara Udayar and Ramu Pillai defendants in O.S. No. 77 of 1949 and respondents in A.S. No. 224 of 1951 are connected with auction sales evidenced by Exhibit A-144. Thus it will be seen from the above enumeration of the bidders' list that at one and the same auction any of these tenants had bidden and purchased portions of the lands for cultivation on lease but the important factor to be noticed is that for a long time either the same individual or his predecessors have been purchasing the same lands at the auction. There is therefore some justification for the arguments of the learned counsel that the tenants did not care what the recitals in the lease deeds they were executing were so long as the lands continued to be in their possession and cultivation. As can be gathered from the judgment of the Judicial Committee in *Buchayya* v. *Raja Parthasarathy Appa Rao*[1], which confirmed the decision of this Court such admissions by the tenants should not be taken to be absolutely binding on them. The documents referred to above also show the continuous occupation of the lands by the defendant.

The next argument of Mr. T.M. Krishnaswami Iyer is that assuming Orathur padugai is not a complete village in itself but is part of a bigger village still under the amendment of 1936 it is an estate. Exhibit B-8 is the Record of Rights Register relating to Inam Pannimangalam village prepared in the year 1935 and according to that there can be no doubt that the entire Pannimangalam is a whole inam village. Under the heading "Situation of the village and its hamlets" it is stated that the village lies in the Vennar Delta, ten miles north-east of Mannargudi and that it has no hamlets. Though in the second paragraph it is stated that the village is not governed by the provisions of the Madras Estates Land Act such a description was given before the Amending Act of 1936 came into force. Items 32 to 38, 41, 42, 43, 46, 48 and 75 to 81 in Exhibit B-8 are the suit lands and it is seen from the entries in column 8 *viz.*, "name of the landholder" that except a very few items, the entire land is owned and held by the Tanjore Palace Estate. With regard to the remaining lands some are held by a temple to which they have been dedicated, and the rest by the owners who are the purchasers from the Receiver of the Tanjore Palace Estate. In C.M.P. No. 8435 of 1955 we have admitted a sale deed dated 29th March, 1932 executed by one of the claimants to the Tanjore Palace Estate in favour of the Daivasigamani Udayar. The vendor is described as landlord. That being the case it must be deemed that the whole village was a whole inam village at the time of the grant. We have also to remember that the East India Company could have granted only the melwaram right for it could not be imagined that the Company would have cultivated the lands as such. So whatever might have been the nature of the holding prior to 1862 the grant during that year could not be anything but only of the melwaram. Exhibit B-35 is the proceedings of the Settlement Officer IV Tiruchirapalli and it relates to inam Pannimangalam village. The opening sentence in the order of the Settlement Officer is :—" This is an entire inam village in Mannargudi Taluk, Tanjore District " and in paragraphs 4 and 5 of the Order the Settlement Officer discusses the question *in extenso* and comes to the conclusion that the village is an estate under section 3 (2) (*d*) of the Estates Land Act. In the concluding portion of the order it is stated that the oral and documentary evidence in the case clearly proves that this village has become an estate by virtue of the amended Act of 1936. It is also seen that the customary rents alone were collected from the tenants and not the actual rents even from very early times. See the rent fixed in Exhibit A-12.

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[1] (1921) 41 M.L.J. 669 : L.R. 48 I.A. 387: I.L.R. 44 Mad. 856 (P.C.).

The argument of the learned counsel for the appellant is that the grant is of a minor inam to which the Amending Act of 1936 will not apply because according to him only portions of the 199 villages were given and that there was no grant of the whole inam as such. If that is so, section 3 (2) (*d*) of the 1908 Act cannot apply. We have aleady dealt with the question regarding the existence of other land-holders in Exhibit B-8. In our view Exhibit B-8 relates to the whole inam village.

As an alternative argument learned counsel for the appellant puts forward the contention that assuming that Orathur padugai may be termed to be an estate under section 3 (2) (*d*) of the Act still the question has to be decided as to whether the lands in question are ryoti lands or private lands. According to him the preponderance of documentary evidence showing the course and conduct and the dealings for over a hundred years can point only to one inference and that is that at no time were the lands considered as ryoti lands. Reference was made to Exhibit A-147 in this connection. It has already been stated that Exhibit A-128 and A-129 cannot refer to the suit lands and in regard to Exhibit A-147 though the words *Ekabogam thottam* and proprietor appear, one has to remember that the estate formed part of the Raj and the subsequent course of conduct indicates no such conclusion. In *Naina Pillai Maracair* v. *Ramanathan Chettiar*[1], the expressions *rokhaguthagai miras* and *ekabogam* villages are stated to mean that it was a *rokhaguthagai* village and that all the lands in the village were the property of one proprietor. Founding his argument on these expressions in that judgment, Mr. Kesava Ayyangar wants the Court to infer that because *ekabogam thottam* is used in Exhibit A-147, the entire lands must be deemed to be under the sole proprietorship of the land-holder. There may be something to be said for this argument but Exhibit A-147 is a century and a quarter old and even though there were some recitals of that kind in 1830, subsequent to 1862 there is nothing to show that such a proprietorship vested in the grantees from the Crown. It is next urged that in Exhibit B-8 under column 8 "name of the land-holder" while the name of Kalidasa Iyer who was the Receiver of the Tanjore Palace Estate is given, in column 9 ".name of the ryot and where there is no ryot, name of the occupier" there are no entries at all. That being the case we are asked to say that at least with respect to such lands both the warams vested in the owner. But with regard to other lands where the name of the land-holder is given as Raja Sri Pratapa Simha Raja Sahib in column 9 the names of the ryots have been given. The contrast according to the appellant is significant, and what is urged is that under section 167 of the Estates Land Act there must be a presumption as to the correctness of the record-of-rights. It is also argued that in the Land Register, Exhibit A-134 in column 7, "Whether Tanjore Palace Estate has melwaram right only or both the melwaram and the kudiwaram the entry is both the warams and the entry against the column. "Number and name of Pattadar or inamdar " is

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[1] (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.).

> "The cases in which the Tanjore Palace Estate has not kudiwaram rights shall be entered as the Tanjore Palace Estate".

We do not think that these documents are of any use in considering the question whether the lands in question are private lands. There is a distinctive difference between the owner having both the warams vested in him and the zamindar keeping some of the lands as his domain or private lands the nature of which has been described in the judgment of Wadsworth, J., in *Jagadeesam Pillai* v. *Kuppammal*[1], where despite similar indications it was held that after 1936 the village became an estate.

We may now note the various documents on which the appellant's counsel attempted to lay the foundation for his arguments regarding the private character of the lands in question. But in our opinion they do not afford any basis for a definite conclusion. A group of documents such as Exhibits A-5, A-8, A-12 to A-60 ranging over a period from 1870 to 1879 styled as Adaiolai muchilikas containing agreements were prominently brought to our natice to show that the transactions in those documents were such as would be between an ordinary lessor and a lessee. Of them in Exhibit A-6, dated 4th September, 1870, recitals as those contained in an ordinary lease regarding payment, of rent, ownership of the lessor and the liability of the lessee to surrender the lands at the expiry of the lease period are contained. In Exhibit A-7 also there are similar provisions. Exhibit A-8 shows that the lands were taken on lease for the purpose of grazing cattle and cutting grass for a period of five years. In a like manner there are recitals in Exhibits A-12 and A-13. It may be that to some extent the recitals in these leases support the case of the appellant but the fact remains that the grant was of the whole inam village and viewed in that light there will be great difficulty in accepting the contention that the lands in question are private in nature. None of these arguments show that if the village is an estate the lands in question are private lands.

We are then called upon by the learned counsel for the appellant to consider the various leases ranging from 1895 till 1945 evidenced by Exhibits A-160, A-152, A-153, A-154, A-155, A-158, A-99, A-104, A-159, A-106, A-109, A-110, A-161, A-170, A-118, A-119, A-162, A-163 and A-130. Of these leases Exhibits A-116 A-152, A-153, A-154 and A-155 are between 1895 and 1908 and therefore prior to the Estates Land Act of 1908 containing covenants and agreements that are found in an ordinary lease with reference to private property. Exhibit A-158, dated 7th October, 1909, which came into existence very soon after the passing of the Estates Land Act (I of 1908) contains a statement in paragraph 21 that the lands leased do not come within the definition of the word "estate" under the Madras Act I of 1908. In Exhibit A-99 there is a condition that at the expiry of the lease period the lessee shall put the estate in possession of the landholder. Exhibit A-104 is a lease which was granted after obtaining the orders of the Court regarding the granting of the lease and at the bottom of this document there is an endorsement by the receiver addressed to the Karnam, Pannimangalam vattam. There is also the direction of the Subordinate Judge that the lease of the land may be resold by the Revenue Inspector after the Court was appraised of the fact that the sale may be confirmed in the name of one Rasoo Udayan the highest bidder. In Exhibit A-159, clause 22 is to the effect that the lease land did not come under the definition of the word 'Estate' under the Madras Act I of 1908. The sale to the highest bidder as is seen from the bidder's list in Exhibit A-104 is confirmed and there is also the order of the Subordinate Judge at the foot of the document. See also Exhibit A-109, sale proclamation and sale account of lease of lands. The auction-sales of the lease-hold rights similar in character are mentioned in Exhibit A-116, dated 12th February, 1916, Exhibit A-161, dated 16th July, 1917, Exhibit A-117, dated 21st April, 1919, Exhibit A-118, dated 30th December, 1919 (with regard to the right to fish in the Palaya Koranjara), Exhibit A-119 dated 24th July, 1919 (where the land is described as private punja). In some of them there are clauses to the effect that the lease lands do not come within the definition of 'Estate' in the Madras Estates Land Act I of 1908 and there are also agreements to surrender the leasehold rights after the expiry of the term of the lease. Some of the bidders' lists contain endorsements by the Court confirming the bid. The preamble portion of Exhibit A-162, dated 9th Februray, 1923, states that the land belongs to the Tanjore Palace Estate with rights to both the warams both previously and also at the time of the leasing of the land. Particular stress is laid on such a recital to show the conduct and consciousness of the landlord and the tenants in 1923 to the fact that no occupancy rights vested in the tenant at all. Exhibit A-163, dated 29th September, 1923, is another lease containing clauses relating to the surrender of the land after the expiry of the lease period and also to the non-applicability of the provisions of the Estates Land Act. There are also other clauses in this document such as would be found in an ordinary lease under the Transfer of Property Act. In addition to these even after the Madras Act XVIII of 1936 was passed there have been leases: Exhibit A-130, dated 8th March 1938, which is the notice of auction sale of lease by the receiver. When the receiver applied to the Court on the 7th of November, 1936, for permission to recognise certain tenants as kudiwaramdars the District Judge of West Tanjore passed an order on 18th November, 1936, that before granting occupancy rights the receiver should satisfy himself thoroughly in each case an application is made, that the tenant is entitled to such rights under the law and that the previous permission of the Court should also be obtained. Permission to the receiver to confer kudiwaram rights on certain tenants was accorded only on these conditions. The only inference that can be drawn according to the learned counsel for the appellant from the above documents is that prior to the Act of 1936 no kudiwaram right had vested in the tenant at all but it was considered necessary by the receiver to get permission of the Court to grant kudiwaram rights to the tenants. Therefore, there was no question of Orathur padugai being considered an estate under Act I of 1908. Subsequent dealings by the receiver were also pointed out as explanatory of the way in which the rights existed prior to 1936 and a number of documents relating to them were referred to. It is not necessary to consider in any detail the relevant portions of the various documents relating to transactions subsequent to 1936 except to note that in some of them there are statements to the effect that the Tanjore Palace Estate has right to both the warams, and that the lands do not come within the definition of the word 'Estate' under the Estates Land Act (I of 1908). Exibits A-135, dated 27th February, 1940, A-136, 137, A-138, A-139, A-140, A-141, A-142, A-143, A-144 and A-133 evidence transactions after 1936 where recitals are contained to that effect: Learned counsel for the appellant strenuously argues that there is no question of any occupancy rights being vested in the tenants at all. As stated already, Exhibits B-2 to B-29 are receipts granted to the various tenants during a long period and though some of them relate to years prior to 1936 a large majority of them are acknowledgments of payments of rent subsequent to 1936. It is seen that Exhibits B-1 is dated 18th January, 1936 and Exhibit B-29, is of the year 1945. How payments of rent on the conditions mentioned in these receipts could be justified if the lands in question are part of an estate could not be properly explained according to the learned counsel for the appellant, except on the hypothesis that the tenants had during this period admitted that both kudiwaram and melwaram vested in the owner of the land. The respondent's counsel counters by inviting our attention to the fact that in Exhibit A-160 which is as early as 6th May, 1895 and the subsequent lease-deeds Exhibits A-161 and A-162 the tenant has agreed to repair the channels which irrigate the lands, he has taken on lease and maintain them in good condition always and also pay water cess if necessary. Such a state of things would not be explainable unless it be that the tenant has kudiwaram right. The observations of

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[1] (1946) 1 M.L.J. 23 : I.L.R. 1946 Mad. 687.

Satyanarayana Rao, J., in *Periannan* v. *A.S. Amman Kovil*[1], where the learned Judge says at page 106 that if the lands are private lands repairs would be effected by the landlord are relied on. That not being the case here the contrary position should be accepted here. That padugai lands cannot be treated as ryoti land is evident from the statements contained in the decision in *Sethu Chettiar* v. *Sarangapani Ayyangar*[2], where Chandrasekhara Aiyar, J., expressed the opinion that even though such lands may not be part of the river bed they may form part of the river bank in which case also as in the case of river beds the lands cannot come within the definition of ryoti lands. The respondent also contends that the fact that in some of the lease deeds and receipts both the warams are mentioned as belonging to the landlord does not necessarily mean that such lands are private lands though in all private lands the landholder may own both melwaram and kudiwaram but it is possible to have ayan lands having such descriptions: *Vide* the observations of Viswanatha Sastri, J., in *Periannan* v. *A.S. Amman Kovil*[1] (at page 110). It has also to be remembered that conveyancing in these areas has not reached that level of perfection where terms can be understood in a scientific manner. We are inclined to think that there is some force in this contention. See also the observations of Krishnaswami Nayudu, J., in *Govindaswami Naidu* v. *T. P. Devasthanam.*[3]

It is next urged that under Exhibit B-6 the receiver himself transferred the kudiwaram right to the tenants which could not be the case if no such right vested in the landlord and the appellant purchased the properties subject to the sale made by the receiver and pattas granted as evidenced by Exhibits B-30, B-31 and B-33. The receiver himself has made a distinction between lands where the occupancy rights existed and those in which there were no such rights. We are not much impressed by these arguments for unless it be as a basis for estoppel any acquiescence by the tenants in certain actions of the landlord would not take away from the tenants the benefit conferred on them by Act XVIII of 1936. The fact that subsequently the villages were treated as estates within the meaning of the term under the Act even if some of the documents justify that conclusion, would not make them an estate because the subsequent treaty cannot put an end to the nature of the lands under the original grant. So argues the learned counsel for the appellant and relies upon *Janakirama* v. *Gopalan*[4], and *Chinna Basavayya* v. *Satya Bhigna Theerthaswamulu Varu*[5], and also the observations of the Supreme Court in *The District Board, Tanjore* v. *Noor Mahmed Rowther*[6]. We do not think that these decisions help us in any manner for any conclusion to be arrived at on the facts of the case.

Learned counsel for the appellant points out that in examination-in-chief, P.W. 1 states that the lands were iruwaram lands and that Orathur padugai land was divided on iruwaram basis. We do not think that this statement of P.W. 1 carries the case of the appellant any further. On the other hand Mr. T. M. Krishnaswami Iyer for the respondents has referred to section 3, sub-clause 10 (*b*) of the Estates Land Act where private land is defined and what is private land within the meaning of sub-clause (*d*) of section 3 (2) is contained in sub-clause (*b*) of clause 10 and under section 185 of the Act the presumption is that the lands in an inam village are not private lands and the case has to be decided on evidence adduced to hold whether a particular land is private land or not. What is private land is explained in the headnote of the Full Bench decision in *Periannan* v. *A. S. Amman Kovil*[1], which is to the effect that mere proof, that the landholder is the owner of both warams does not necessarily mean that it is private land. Passages at pages 81, 89, 90, 97, 105 and 108 were also relied upon. We are satisfied that on the evidence there is no question of the lands being private.

We have already referred to the fact that though the leasing rights were auctioned periodically, one and the same tenant continued to bid at the auction and become the lessee and it did not matter to him so long as he was allowed to occupy the lands whether an annual auction was held or not. This is evident from the evidence of the Karnam of Pannimangalam village examined as D.W. 1. His testimony is to the effect that Orathur padugai is an inam village and that the tenants continued to cultivate the land without break or a change and that some of them resided in the village itself while the rest lived in neighbouring villages. D.W. 2, defendant in O.S. No. 78 of 1949 speaks to the continuous possession of himself and his father from a very long time. P.W. 7, T.N. Kalidasa Iyer, who was receiver of certain lands belonging to the 31st defendant in O.S. No. 3 of 1919 is not able to give any specific explanation and P.W. 2 states that except defendants in O.S. No. 75 of 1949 no one used to bid at the auction. P.W. 4's evidence is also significant. In these circumstances we are inclined to agree with the learned counsel for the respondent that the fact that there were periodical auctions of the right to cultivate lands on lease and that some of the tenants purchased that right did not necessarily deprive the tenants of the occupancy rights which they were enjoying.

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[1] (1952) 1 M.L.J. 71 (F.B.).
[2] (1945) 2 M.L.J. 380.
[3] (1954) 2 M.L.J. 702 at 706.
[4] (1951) 2 M.L.J. 272.
[5] (1950) 2 M.L.J. 607.
[6] (1952) 2 M.L.J. 586; 65 L.W. 98 at 102 (S.C.).

The above discussion disposes of almost all the points elaborately argued on both sides and our conclusion, therefore, is that with regard to the nature of the lands in question prior to 1856 no definite conclusion is possible but that the grant of 1862 so far as the village of Pannimangalam is concerned, is of the whole inam village which became an estate under the Madras Act XVIII of 1936. Exhibit B-8 is a very important document evidencing that no acceptable explanation has been or could be offered by the appellant's counsel about that. In addition the proceeding of the Settlement Officer, Tiruchirapalli, evidenced by Exhibit B-35 treating Pannimangalam as an entire inam village cannot seriously be disputed. We have, therefore, to hold that the plaintiff's suits are not maintainable.

With regard to the onus of proof a distinction has to be made as regards eviction and the jurisdiction to maintain the suit. This distinction is brought out in the decisions in *Venkatarama* v. *Venkayya*[1], *Virabhadrayya* v. *Sonti Venkanna*[2], *Ramamurthi Sastri* v. *Ammanna*[3] and *Lakshmanna* v. *Venkateswaralu*[4]. We are not satisfied that the learned Subordinate Judge has erred in thinking that the onus has not been discharged. If we hold that the grant of 1862 was with regard to a whole inam village and that in any event by the Madaras Act XVIII of 1936 the village became an estate within the meaning of the Act there is no necessity to deal separately with the four survey numbers S. Nos. 34, 1, S. Nos. 35, 37 and 43 as with regard these items the case of the plaintiff stands on a more slender footing.

In the result the appeals fail and are dismissed with costs. Advocate's fee of Rs. 75 in each appeal.

P.R.N. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Sri Venkataramana Devaru of Venkataramana Temple, Moolky, by its trustees and others .. *Appellants**

v.

State of Madras by Collector of South Kanara and others .. *Respondents.*

Madras Temple Entry Authorisation Act (V of 1947) *as amended by Act (XIII of* 1949)—*Definition of temple under section* 2 (1) *of the Act—Article* 26 *of the Constitution—Effect of.*

The definition of 'temple' in section 2 of the Madras Temple Entry Authorisation Act V of 1947 as amended by Act XIII of 1949 is wide enough to include even denominational institutions dedicated for use as of right by the Hindu community or any section thereof within the purview of the Act.

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[1] (1954) 2 M.L.J. 1 : 1954 Mad. 715 (F.B.).

[2] (1913) 24 M.L.J. 659.

[3] (1950) 2 M.L.J. 442 at 443, 447.

[4] (1949) 2 M.L.J. 500 : L.R. 76 I.A. 202 : I.L.R. 1950 Mad. 567 (P.C.).

* Appeal Nos. 145 and 146 of 1952. 11th April, 1956.

So long as there is no intention to exclude the right of worship the restriction on the right of outsiders to interfere with the management of the institution is not a determining factor in deciding whether it is a temple within the definition.

Sri Vishwothama Thirtha v. *State of Madras*, (1956) 1 M.L.J. 125 and *Ramanatha Iyer* v. *Board of Commissioners for Hindu Religious Endowment*, (1945) 1 M.L.J. 239, referred.

Sri Venkataramanaswami temple at Moolky, Mangalore Taluk, South Kanara District, is one coming within the scope of Madras Act V of 1947. But Article 26 of the Constitution relates to the administration of property and to that extent the Gowda Saraswath Brahmins have special privileges.

Appeal against the Decree of the Court of the Subordinate Judge of South Kanara, dated 31st March, 1951 and passed in O.S. No. 24 of 1949.

M. K. Nambiar, *M. L. Nayak*, *A. Narayana Pai* and *K. K. Venugopal*, for Appellants.

The Government Pleader (*C. A. Vaidialingam*) and *N. S. Srinivasan*, for Respondents.

The Judgement of the Court was delivered by

Govinda Menon, J.—Appeal No. 145 of 1952 arises out of O.S. No. 24 of 1949 on the file of the Court of the Subordinate Judte of South Kanara, which was a suit, by the trustees of Sri Venkataramanaswami Temple at Moolky as well as by the members belonging to Gowda Saraswath Brahmin community, Moolky, who are interested as worshippers in the said temple, for setting aside an order of the Government of Madras, dated 25th June, 1948, Exhibit A-13, by which the Government of Madras decided, under section 6 of Madras Act V of 1947, Madras Temple Entry Authorisation Act, that Sri Venkataramanaswami temple at Moolky, Mangalore taluk, South Kanara district, is a temple as defined in the said Act. The other arose out of an application by the trustees and others representing that the said temple is a private temple belonging exclusively to Gowda Saraswath Brahmins and as such the temple is not one used as of right by the Hindu community in general and requesting that the temple should not be declared as one coming within the definition of temple in the Madras Temple Entry Authorisation Act V of 1947. According to the averments in the plaint it is stated that the plaint temple belongs exclusively to the Gowda Saraswath Brahmin residents of the three villages, Mannampady, Karnad and Bappanad collectively known as Moolky Petah and that the said Brahmins are migrants from Goa, Konkan and also from other places in South Kanara district and settled down in these villages. As they were treated as aliens by other Hindus they do not inter-dine or inter-marry with the local Brahmins who do not worship in the temples of Gowda Saraswaths. These persons have their own spiritual heads and they have established their own temples for their religious worship. The management of this temple has always been carried on by the members of the Gowda Saraswath Brahmin community residing in the three villages mentioned above and hereditary archakas of the temple belong to this community. They have distinctive forms of rituals. The " santharpana " in the temple is confined only to this community and it is the special privilege of the spiritual head of this community to initiate the oracle and perform Sahasra Kalasha Maha Samprokshana and other religious ceremonies. It is also stated that the management of this institution is regulated by the scheme settled in O.S. No. 26 of 1915 on the file of the Sub-Court, South Kanara, which is binding on the Government, the general public and everybody concerned. Therefore it is not a public temple wherein any member of the Hindu public has a right of worship. As it is a sectional temple the Hindu public residing in the three villages alone have a right to worship therein and the provisions of Act V of 1947 cannot be made applicable.

On behalf of the State of Madras, the defence put forward was that it is not true that the suit temple belongs exclusively to the Gowda Saraswath Brahmins of the three villages, and it is not true that Gowda Saraswath Brahmins are treated as aliens in South Kanara district. They are as much Hindus as other Hindus are.

They worship in all the Hindu temples and the other Hindus worship in the temples under the control of Gowda Saraswath Brahmins. Even if it is found that the management of the said temple vests in the Gowda Saraswath Brahmin community of the three villages that would not exclude the temple from the operation of the Act as worship is one thing and management in another. The Hindu public in general have been worshipping in the suit temple as of right and have been making large votive offerings. The oracle in the temple has been attracting a large number of worshippers of all communites and this temple has become a place of pilgrimage for all Hindus irrespective of caste or community. It has been collecting offerings made to Sri Venkataramana temple at Tirupathi and to Sri Manjunatheswara temple at Dharmastala and as such the suit temple is not a sectional one.

The learned Subordinate Judge found that the suit temple though founded by the chieftain of the Savantha dynasty for the benefit of certain families whom he had settled down at Moolky, is a temple as defined in the Act and as such it is a place of public worship dedicated to the Hindu community in general. Such being the case section 2, sub-section (2) of Act V of 1947 would be applicable. In the view of the learned Subordinate Judge even if Act V of 1947 had not been amended still the unamended Act would have been applicable to the suit temple. The further finding of the learned Subordinate Judge was that the scheme which governed the suit temple related only to the management of the institution and cannot in any way exclude it from the operation of the Act.

The argument of Mr. M. K. Nambiar on behalf of the appellants is that the institution in question belongs to the Gowda Saraswath Brahmin community of the three villages constituting, the Moolkipetta and as such cannot even be said to be one belonging to a section of the Hindu community with the result that it cannot be brought within the ambit of section 2 (2) of Act V of 1947. Our attention was invited to the description of the Gowda Saraswath Brahmin community contained in the South Kanara District Gazetteer, 1938 edition, published at the instance of the Government of Madras, at pages 193, 194 and 195 and 196. It is not necessary to refer to the historical aspects of the migration of this community from the north. But one thing is clear that after migrating from Kashmir east to Bihar and then to Tirhut and later on some of them westwards to Goa in Southern Konkan, the ancestors of the community now seen in South Kanara must have migrated from Goa on account of the Portuguese persecution. It was also admitted at the Bar that even now some of the Gowda Saraswath Brahmins look up to the temples in Goa as of their family deities or *Kuladevathas.* The account given at page 195 may be quoted :—

> "The Gowda Saraswaths of Goa who migrated to South Kanara and further south were mainly the Sastikars, *i.e.*, Vaishnavas and hardly any of the numerous temples in this district are dedicated to Siva. Nevertheless they have a high regard for Siva and some of them also observe the Siva festivals. All of them worship his consort Gowri and his son Ganesha principally the latter's festival in September. The very important temple in the district is Srimad Ananteswara temple at Manjeshwar, a rich and ancient institution, which was famous even during the time of Madhvacharya who is known to have visited it in about 1293 A.D. and the fact that even then it belonged to this community suffices to argue the existence of their colonies in this district long before they migrated higher in larger numbers after the Portuguese persecution in the 16th century. In this temple in his fourth man-lion incarnation Narasimha and Siva in the Linga form under the name of Ananteswara are worshipped together with equal honours. Another Siva shrine of this community though a small one is at Karangalpadi in Mangalore. Next in imporance, to the Manjeshwar temple are the rich temples at Mulki, Mangalore, Bantval and Karkal, the last of which was erected for them by the Jaina King Bhaivava II in 1537 A.D. In all of these latter temples Vishnu is worshipped under the name of Venkatesa or Venkataramana of the famous Vishnu God at Tirupathi. This God is a great favourite with the community so that very few of their Temples in this district as well as further south are without images of Venkataramana and very few of their houses without two slit boxes called dabbis in which cash offerings are dropped, one dedicated to the family God in Goa and the other to Venkatesa at Tirupathi which are duly made over to the respective deities in course of pilgrimages. Nevertheless they still regard Goa as their mother-country and the temples of their family Gods there as the holiest of their shrines and it is incumbent upon every one of them to visit his family deity in Goa once at least in his life time."

From the above passage extracted, it is clear that the temple in question is an importtant one intended originally at least, for the benefit of the Gowda Saraswath Brahmin community and it is urged that if it was an institution intended for a section of the community the provisions of Article 26 of the Constitution can be invoked which is to the effect that subject to public order, morality and health every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion and to own and acquire moveable and immovable property in accordance with law. The attempt, therefore, is to show that nobody except the Gowda Saraswath Brahmin community can have anything to do with this institution. In O.S. No. 36 of 1890 on the file of the Sub-Court, South Kanara, the question arose as to whether the suit temple is subject to the jurisdiction of the Temple Committee appointed under section 3 of Madras Act XX of 1863 for the supervision of the temple and the decision was that the Temple Committee had no jurisdiction to interfere with the affairs of the temple. The judgment in that suit is Exhibit A-4 in the present case and it deals at some length with the nature of the institution. Exhibit A-5 is the order of the learned Subordinate Judge in O.S. No. 15 of 1902. It was an application under section 525 of the Civil Procedure Code, 1882, to file an award made by the three arbitrators settling disputes concerning the management of the temples belonging to the Gowda Saraswath Brahmin community. It stated that the award annexed to the order be passed into a decree of Court. Exhibit A-6 is the decree in O.S. No. 26 of 1915 on the file of the Court of the Subordinate Judge, South Kanara, wherein a scheme was framed for the management of the institution, and paragraphs 1, 2 and 4 of the said scheme are important according to the appellant which run as follows :

> "1. Shri Venkataramana temple of Moolky situated in the village of Manampadi, Nadisal magane, Mangalore taluk, is an ancient institution belonging to the Gowda Saraswath Brahmin community, *i.e.* the community to which the parties to the suit belong residing in the Moolkypetah, *i.e.*, the village of Bappanad, Karnad and Manampadi according to the existing survey demarcation.
>
> 2. The general control and the management of the affairs of the said temple both secular and religious shall vest in the members of the said community of the said three villages other than Vaidiks, by profession and be exercised by them as hereinafter provided.
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> 4. Every member of the community whose name has been duly registered in a book called the register of electors which should be caused to be maintained by the council of moktessors shall be entitled to vote at the election, etc."

Paragraph 7 of the scheme is concerned with the application for being registered as an elector which should be sent to the parpathygar. Paragraph 20 is with regard to the council of moktessors. Paragraphs 22, 28, 42, 45 and 51 are important and if they are correctly interpreted, would show that none but the members of the community have anything to do with this institution.

Great reliance is placed on paragraph 65 of the scheme which is to the effect that matters regarding misfeasance, malfeasance or non-feasance in connection with the management of the temple affairs and all other matters conected with the temple shall be settled by petition to the Court sanctioning this scheme provided, that the petition is filed by not less than two of the registered electors or by not less than two of the votaries or worshippers of the temple. In these circumstances, a reading of the scheme as a whole would certainly leave one with the impression, as contended for by the appellant's counsel, that none other than the members of the community can have anything to do with this institution. Such being the case the appellant urges that, as stated by Dr. Bijan Kumar Mukherjea (Chief Justice, Supreme Court of India) in his treatise on the "The Hindu Law of Religious and Charitable Trusts", at page 185, this institution should be considered to be a private trust belonging to the community as such. The passage in the book referred to is as follows :

> " A private trust providing for the material or spiritual benefit of individuals and families could not rank as a charitable trust in English law which must be public in its character. In Hindu law, however, it is competent for a donor to create a religious trust the benefit of which is confined to the members of a particular family or the disciples of a particular religious preceptor. So far as Debutter endowment is concerned the essential test to distinguish a private from a public place of worship is

whether the right of worshipping the idol is limited to the members of a particular community or group or extends to all persons professing the Hindu religion."

There can be, therefore, no doubt that it is possible to have a private trust as distinguished from a public place of worship limited to the members of a particular family or group. But the question is whether the institution we are concerned with is one such. The nature of this institution and the applicability of the provisions of the Hindu Religious and Charitable Endowments Act, 1951, came up for consideration in *Devaraja Shenoy* v. *State of Madras*[1], where Satyanarayana Rao and Rajagopalan, JJ., held that the Gowda Saraswath Brahmin community was undoubtedly a religious denomination or at any rate a section of a religious denomination and the protection under Article 26 of the Constitution of India should be allowed to them. Such being the case and in view of the decision in C.M.P. No. 2591 of 1951 *Sri Lakshminarasimha Swamiar* v. *The Commissioner, H.R.E. Board, Madras*[2], that the provisions of the Act in so far as they interfere with the autonomy of the religious denomination which owns and has the sole and exclusive control of the temple should not be allowed to be enforced including the provisions relating to notification procedure; a levy of contribution which offends Article 27 of the Constitution is also illegal.

The learned Judges referred to the decree passed in O.S. No. 26 of 1915 on the file of the Sub-Court, South Kanara, to the effect that the temple and its properties belong to the entire denomination of the community residing in Moolkypettah comprising the three villages above-mentioned. The State Government preferred an appeal against this decision to the Supreme Court and it is common ground that on the 30th of September, 1954, the appeal was dismissed as withdrawn thereby in fact confirming the decision of this Court. The order dismissing the appeal and the certified copy of the memorandum of appeal to the Supreme Court are sought to be admitted as additional evidence by means of C.M.P. No. 2477 of 1956. In our opinion, for a proper appreciation of the points in controversy and to come to a right conclusion as well as to deliver judgment, it is necessary to admit them as additional evidence. All the more so because the order of their Lordships of the Supreme Court as well as the grounds of appeal to that Court were not in existence when the learned Subordinate Judge decided the suit. We have, therefore, decided to admit these documents in evidence.

Mr. M.K. Nambiar then argues that because it is held by this Court that certain provisions of the Madras Hindu Religious and Charitable Endowments Act are *ultra vires* the Legislature and cannot be applied so far as this temple is concerned the impugned Act, namely, Act V of 1947 should not also be applied. The argument is that the definition of " Temple" in the Hindu Religious and Charitable Endowments Act (XIX of 1951) is practically the same as set out in the Madras Act V of 1947, the Madras Temple Entry Authorisation Act, 1947, after the same was amended and the words "Hindu community or a section thereof" were incorporated into the definition. If, therefore, according to the decision of this Court which must be deemed to have been upheld by the Supreme Court the main provisions of Act XIX of 1951 cannot be said to apply to this institution, it is urged that Act V of 1947 cannot also be applied. In *Sri Vishwothama Thirtha* v. *State of Madras*[3], a Bench of this Court to which both of us were parties had to consider th effect of the Temple Entry Authorisation Act, 1947, with regard to Udipi Sri Krishna Temple and there, we held that the definition of Temple Entry Authorisation Act, 1947, as amended by Act XIII of 1949 is wide enough to include even denominational institutions dedicated for use as of right by the Hindu community or any section thereof within the purview of the Act. The provisions of the Act are not repugnant to Article 26 (*b*) of the Constitution of India. The right to manage its own affairs given to a religious denomination by Article 26 of the Constitution is in relation to the business of managing the property, etc., and can have no reference to depriving certain classes or sections of Hindus of their Fundamental Right conferred unequivocally by Article 25 (1) of the Constitution. What is contemplated by Article 26 (*b*) by " right to manage in matters of religion " is different from the right to practise religion. The right given relates mainly to superintendence or superivision of the property and to prescribe the modes of worship, time at which the public can worship, etc.

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[1] (1952) 2 M.L.J. 481.

[2] (1952) 1 M.L.J. 557.

[3] (1956) 1 M.L.J. 125.

By reading Articles 25 and 26 of the Constitution together the question of temple entry is not involved in Article 26 (*b*) but is considered only in Article 25(2) (*b*) which is an exception to Article 25 (1) which guarantees to any citizen the right to profess, practise and propagate his religion. This freedom of practising religion can be restricted by the Legislature when it infringes the right of all classes of Hindus to worship freely in a Hindu religious institution of a public character. The power of the state to make a law for throwing open Hindu religious institutions of a public character as contemplated in Article 25 (2) (*b*) of the Constitution is not in any way circumscribed, restricted or whittled down by the provisions of Article 26 (*b*) giving a religious denomination the right to manage its own affairs in matters of religion. The prohibition of untouchables from entering into a denominational temple is not a right of that denomination to manage its own affairs in matters of religion. The Madras Act V of 1947 comes within the provisions of Article 25 (*a*)(*ii*) of the Constitution and is made to continue in force until repealed or amended by Parliament. The Act will have full effect as it is in consonance with the provisions of the Constitution and is in fulfilment of the directive principle contained in Article 17 of the Constitution.

Article 26 of the Constitution deals with a special aspect of the subject of "religious freedom " dealt with under Article 25. The right guaranteed under Article 25 is an individual right while the one guaranteed under Article 26 is a collective right of a religious denomination. The practice of untouchability cannot be protected under the guise of freedom to manage affairs in matters of religion. It will provoke public disorder and will be contrary to public morality enshrined in Article 17 of the Constitution. The freedom of religion guaranteed by Article 25 of the Constitution is itself subject to the qualifications prescribed in sub-clause (2) of that Article itself. Except denominational or family endowments or institutions, all public institutions will be within the scope of the Madras Act V of 1947 and the application of the Act to such temple is not *ultra vires* the Constitution. We have set out there the preamble to Act V of 1947 and also its amendment by Act XIII of 1949 and come to the conclusion that the Act as originally passed provided for the entry of Harijans into the temples which are thrown open to the general Hindu public alone and by the Amending Act XIII of 1949 it was made applicable even to denominational temples. So the definition of temple in section 2 of the Madras Temple Entry Authorisation Act, 1947 as amended by Act XIII of 1949 is wide enough to include even denominational institutions dedicated for use as of right by the Hindu community or any section thereof within the purview of the Act. It is unnecessary therefore to elaborate any further about the applicability of the Act to this institution and we prefer to adhere to the opinion expressed in *Sri Viswothamma Thirtha* v. *State of Madras*[1]. The Shivali Brahmin community with regard to which the temple of Sri Krishna at Udipi came up for consideration is analogous in many respects to the Gowda Saraswath Brahmin community with whom we are now dealing. Both these communities are sections of the Hindu community and Sri Krishna temple at Udipi as well as the temple now in question may be called denominational temples.

But we are pressed with the argument by the learned counsel for the appellants that since Venkataramana's temple is founded for the benefit of the families of the Gowda Saraswath Brahmin residents of the three villages which constituted Mulkipet they cannot be called sections of the community unless it be that the temple is intended for the entire body of Gowda Saraswath Brahmins residing anywhere in the territory of the Union of India. The evidence of P.W. 1 in O.S. No. 24 of 1949 upon which great stress is laid is to the effect that the suit temple belongs to the Gowda Saraswath

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[1] (1956) 1 M.L.J. 125.

Brahmins of the three villages of Mulkipet and that its management is according to a scheme as per Exhibit A-6. The Gowda Saraswath Brahmins of other villages have no right over the suit temple. The archakas of the suit temple belong to Gowda Saraswath Brahmin community and they are chosen from the different gotra Brahmins. In cross-examination he had to admit that all Hindus other than untouchables can enter into the temple without any permission except on special occasions mentioned by him. He goes on to say that notwithstanding this usage the members of the Gowda Saraswath Brahmin community have a right to prevent members of other communities from entering into the suit temple and that it is not necessary for members of other communities to seek permission of anybody for entering into the temple on ordinary occasions. The witness also admitted that there is a "dabbi" in which are put contributions meant for the temple at Tirupathi. Contributions to this "dabbi" are made not only by the members of the Gowda Saraswath Brahmin community but by other communities as well. There was a suit filed by the Tirupathi Devasthanam for recovery of these contributions which was decreed by the High Court. There is another dabbi wherein kanikas meant for Manjunatheshwar sthala are put. A reading of the evidence of P.W. 1 cannot but lead one to the conclusion that Hindus other than untouchables belonging to all denominations have a right to worship in the temple. Had it not been for the fact that this is a temple to which section 92 of the Civil Procedure Code was applicable and as such a public temple it would not have been possible for the Court to have framed a scheme in O.S. No. 26 of 1915. It is idle of the appellants to contend now that the institution is a private trust of a section of the community which can prevent other Hindus from worshipping in the temple as of right without let or hindrance during prescribed times.

The learned Government Pleader appearing for the State drew our attention to *Ramanatha Iyer* v. *Board of Commissioners for H.R.E.*[1], and the various observations contained in different portions of that judgment. There, it was held by a bench to which one of us was a party that where there has been a dedication of a temple to a section of the Hindu community though not to the entire Hindu community it would be sufficient to bring the institution within the definition of "temple" in section 9 (2) of the Madras Hindu Religious and Charitable Endowments Act which is section 6 (15) of Madras Act XIX of 1951. Dedication of a temple to the public is a fact which could be inferred from the circumstances of a particular case and need not necessarily be based on documentary evidence. So long as there is no intention to exclude the right of worship the restriction on the right of the outsiders to interfere with the management of the temple is not a determining factor in deciding whether it is a temple within the definition of the Act. Even if a village community has founded a temple the community nonetheless is a section of the public and the temple is therefore, a public temple. The essential requirements of a temple are that it should be a place dedicated to or founded for the benefit of the Hindu community or a section of it and should be used as a place of worship as of right.

The discussion at pages 241 and 243 of the report makes the point quite clear and we prefer to follow the observations contained therein. As a matter of fact it cannot be said on the evidence of P.W. 1 that a section of the Hindu community alone has a right to worship in the temple without let or hindrance. Exhibit A-8 dated 27th April, 1937, contains the inspection notes of the Commissioner, Hindu Religious Endowments, Madras wherein it is stated that one of the many sources of income for the temple is the oracle.

The day of his visit being the Dasami day the oracle was working and large crowds had assembled to get predictions from the oracle by paying four annas for every question. Exhibit A-9 is a similar inspection report dated 3rd March, 1939 and there also the functioning of the oracle and "dabbi" collections are metioned. We have already referred to the admissions made by P.W. 1 in this connection.

We have, therefore, no doubt whatever that the learned Subordinate Judge was right in holding that this suit temple is one as defined in section 2 (1) of Act V of

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[1] (1954) 1 M.L.J. 239.

1947. But with regard to the administration of the temple there are certain peculiar features as can be gathered from the scheme framed in the suit and the matter has been dealt with in detail by this Court in *Devaraja Shendy* v. *State of Madras*[1]. As has been held in *Sri Viswothama Thirtha* v. *State of Madras*[2], Article 26 of the Constitution relates to administration of property and to that extent the Gowda Saraswath Brahmins have a special privilege in the temple. We need only refer to the various provisions of the scheme in O.S. No.26 of 1915. But there are certain other privileges which in view of the special character of this temple have to be preserved so far as the Gowda Saraswath Brahmin residents of the three villages are concerned. They are that during santharpanas no one other than Gowda Saraswath Brahmins can be allowed to enter the temple and every day during Mahanaivedyam it is open to the trustees to prohibit the entry of persons other than members of the community to which the suit temple belongs into the precincts of the temple. Such restrictions can be allowed during the time of sahasra kalasam once a year and santharpanams during the five days of Rathotsavam. During all these religious ceremonies the trustees can regulate the entry of persons other than Gowda Saraswath Brahmins into the shrine. On other days and other occasions, as this is a public temple as defined in the Act we do not see any justification for not applying Act V of 1947 to this temple. The learned Subordinate Judge, except as regards the above matter has come to the correct conclusion and therefore subject to the modifications mentioned above the appeal is dismised.

With regard to the costs we are of opinion that the learned Subordinate Judge was wrong in making the plaintiffs personally liable for the costs of the defendant. It seems to us that in a matter like this where the litigation has been *bona fide* costs should come out of the temple funds and that the plaintiffs will be entitled to charge the institutions with costs in this Court and in the Court below.

A. S. No. 146 *of* 1952.

This appeal arises against the dimissal of a similar suit in regard to an order made by the Government G.O.Ms. No. 721 dated 6th August, 1949 to the effect that Sri Venkataramana temple in Mangalore town is a temple as defined in section 6 of Madras Act V of 1947. The claim made was that it was a private temple founded by the Gowda Saraswath Brahmin community and that it belongs to the said community. The learned Subordinate Judge has come to the same conclusion as in the other suit with regard to Moolkipet temple and hence this appeal.

The affairs of this temple are governed by a scheme framed in O.S. No. 5 of 1927, Exhibit A-4 dated 26th March, 1929, on the file of the District Court, South Kanara. Paragraph 14 of the Judgment of the learned District Judge commences by stating that the plaint temple called the Sri Venkataramana temple of Mangalore belongs to the Gowda Saraswath Brahmin community and is possessed of considerable moveable and immoveable properties. After discussing the evidence in the case a scheme was framed incorporating the conclusions arrived at by the learned District Judge. Paragraph 2 of the scheme is to the effect that the temple in question is an institution belonging to the Gowda Saraswath Brahmin community. There are various other provisions made with regard to the management of the temple. It is, therefore, clear that the temple is one to which both Act XX of 1863 as well as Act II of 1927 had been made applicable. The definition of temple in section 9 (12) of Act II of 1927 is similar to the definition in Act XIX of 1951 with only slight variations and practically the same definition is contained in Act V of 1947. It is, therefore, evident that the argument cannot be advanced that the temple in question is not one to which Act V of 1947 will not apply. The evidence of P.W. 1 in the suit out of which this appeal has arisen if properly understood could only mean that the temple is a public institution though its affairs are managed by the members of the Gowda Saraswath Brahmin community of Mangalore as laid down in the scheme referred to above.

P.W. 1 recounts the various religious ceremonies in the temple at which the members of the other communities cannot participate. What he states is, that

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[1] (1952) 2 M.L.J. 481.

[2] (1956) 1 M.L.J. 125.

Rathothsavam in Magha Sudha will be celebrated for six days, Pavitraropanam in Sravanam Suddha, Rig Upakarma in Sravanam Poornami, Vinayaka Chathurthi on Bhadrapada, Ananthavratham in Bhadrapada and on some of these occasions there would be Brahmin santharpanam ; food after naivedyam would be served as prasada to the Brahmins. Only members of the Gowda Saraswath Brahmin community can participate in santharpanas. On all these occasions no non-Gowda Saraswath Brahmin would be allowed inside the premises of the temple. Likewise no non-Gowda Saraswath Brahmins would be allowed inside at the time of Mahanaivedayam and during Satakalasha and Sahasrakalasha. We have already referred to the restrictions regarding the participation of the other sections of the Hindu community in the religious ceremonies during the relative times and periods in our judgment with regard to Moolkipet temple. The same would apply so far as the Mangalore temple also is concerned as also to the ceremonies mentioned by P.W. 1.

But it is urged by the learned Government Pleader that in regard to the Mangalore temple notice under section 80 of the Civil Procedure Code is not sufficient and he relies upon the decision in *Bhaghchand Dagadusa* v. *Secretary of State for India*[1], *Vellayan Chettiar* v. *Government of the Province of Madras*[2], *Government of Province of Bombay* v. *Prestonji Ardeshir Wadia and others*[3]. We do not think that in a case of this kind it can be held that Exhibit A-10 is not proper notice which statedly refers to section 80, Civil Procedure Code and gives intimation that a suit would be filed for setting aside the order of the Government of Madras in G.O. Ms. No. 721, dated 6th August, 1949. The learned Subordinate Judge has held following *Vellayyan Chettiar* v. *The Government of the Province of Madras*[2] and *Province of Bombay* v. *Prestonji Ardheshir Wadia*[3], that there was want of proper notice in the case. We are not inclined to hold that notice in this case is insufficient though we agree with the learned Subordinate Judge that section 2 (1) of Act V of 1947 is applicable and that Article 26 of the Constitution cannot refer to the entry contemplated in Act V of 1947. In this connection we may also consider the recent legislation contained in the Untouchability (Offences) Act, 1955 (XXII of 1955) which by section 3 provides for punishment for enforcing religious disabilities. After coming into force of Act XXII of 1955, all the arguments on behalf of the appellants would be pointless when once it is found that it is a place of public worship.

Subject to the modifications mentioned in Appeal No. 145 of 1952 and the other referred to above this appeal is also dismissed. There will be a similar order with regard to costs. The costs of the State in both the appeals will come out of the Suit temple

V.S. ——— *Appeals dismissed subject to modifications.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

K. Gopalaswami Ayyangar .. *Appellant**

v.

Sri Athmanathaswami Devasthanam at Avidayarkoil by hereditary trustee Subramania Pandara Sannadhi, Atheenakartha of Tiruvaduthurai Atheenam, Tiruvaduthurai .. *Respondent.*

Madras Estates Land Act (*I of* 1908)—*Land wholly uncultivated before being let into possession—Ryot land or Private land—Meaning of the word* "*cultivable*" *in section* 3 (16) *of the Act—Power of trustee to let a tenant into possession of Ryoti land—Whether amounts to alienation requiring sanction of the Hindu Religious Endowment Board under section* 76 (1) *of the Madras Hindu Religious Endowment Act* (*Madras Act II of* 1927).

Lands wholly uncultivated before being let into possession, can never be called home farm lands or private lands at their inception.

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1. (1927) I.L.R. 51 Bom. 725 at 747: L.R. 54 I.A. 338: 53 M.L.J. 81 (P.C.).
2. L.L.R. (1948) Mad. 214, 217, 219: L.R. 74 I.A. 223: (1947) 2 M.L.J. 208 (P.C.).
3. I.L.R. (1949) Bom. 110 at 116: L.R. 76 I.A. 85: (1949) 2 M.L.J. 161 (P.C.).

* Appeal No. 7 of 1954. 12th July, 1956.

The word 'cultivable' occurring in section 3 (16) of Act I of 1908, is different from 'cultivated'. Any land which can be cultivated systematically will be 'cultivable' land. They must be deemed to be Ryoti until the contrary was proved.

Pattabirami Reddy v. *Balarama Reddy*, (1950) 1 M.L.J. 458 : L.R. 77 I.A. 104 : I.L.R. (1950) Mad. 959 (P.C.), and *Naganna Naidu* v. *Pitchayya*, (1929) 57 M.L.J. 654 : L.R. 56 I.A. 346 : I.L.R. 52 Mad. 797 (P.C.), followed.

A trustee has himself powers in the ordinary course of his management to let a tenant into possession of such Ryoti lands remaining uncultivated, even though the consequence of it would be that the tenant would acquire occupancy rights. There is no need for him to obtain the sanction of the Hindu Religious Endowment Board, it being not an alienation of trust property or even a permanent or long lease of private or pannai lands.

Pattabirami Reddi v. *Balarama Reddy*, (1950) 1 M.L.J. 458 : L.R. 77 I.A. 104 : I.L.R. (1950) Mad. 959 (P.C.), applied.

Narayanaswami Naidu v. *Subramanyam*, (1915) 29 M.L.J. 478 : I.L.R. 39 Mad. 683 ; *Kallalagar Devasthanam* v. *Antony Moopan*, (1924) 48 M.L.J. 147 and *Mahant Mahabir Das* v. *Udit Narain Verma*, (1938) I.L.R. 17 Pat. 594, referred.

The tenant acquires occupancy rights and a suit to evict him must be filed only in a revenue Court.

Appeal against the decree and judgment of the Court of the Subordinate Judge of Tanjore dated 29th August, 1953 and made in O.S. No. 70 of 1953.

V. Vedantachari and *T. Rangaswami Ayyangar* for Appellant.

M. Ranganatha Sastri, *S. Gopalan* and *M. V. Kapali Sastri* for Respondent.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—The appeal has been filed by one Gopalaswami Ayyangar, the defendant in O.S. No. 70 of 1953, on the file of the Subordinate Judge, Tanjore (O.S. No. 22 of 1951, on the file of the District Court, West Tanjore). The facts were briefly these:

That was a suit filed by Sri Athmanathaswami Devasthanam of Avidayarkoil, by its hereditary trustee, Sri Subramania Pandarasannadhi, Atheenakartha, of the Tiruvaduthurai Atheenam, for recovering Rs. 11,415-8-6 being the principal and interest due from the appellant, as damages for use and occupation of the temple lands for faslis 1357-1360, at Rs. 3-9-0 per acre per annum. It was alleged that the suit lands measuring 729 acres 17 cents and lying in three villages, Kalagam, Pazhayanagaram and Arasulankaranbai, belonged absolutely to the temple in *iruwaram eka bhogam* right and did not constitute ryoti lands but were *pannai* or *home farm* lands which lay as waste from time immemorial and constituted old waste, and that in fasli 1354, the then Pandarasannadhi, the previous trustee of the temple, was trying to reclaim some portions of those lands and to bring them under cultivation, in pursuance of vigorous grow-more-food campaign initiated by the revenue authorities and encouraged by the H.R. E. Board, but that as the temple had not the necessary resources, the progress of reclamation, if undertaken by it, would be inappreciable and very slow. The Government were urging for speedy reclamation of these lands and for bringing them to cultivation, as they were irrigable under the Cauveri-Mettur project. The revenue authorities recommended one Srinivasa Ayyangar as a suitable man for taking in hand the reclamation, as the temple was not able to do it by itself. But Srinivasa Ayyangar's offer was not accepted for some reason or other by the then Pandarasannadhi. The Manager of the Tiruvaduthurai Mutt was one V. Krishnaswami Ayyangar then. He was also the legal adviser for the Mutt at Kumbakonam. His grandson was married to the appellant's daughter. Whether the appellant came to know about this scheme for reclaiming the suit lands from his *sambandhi* Krishnaswami Ayyangar, the manager, or independently, he made an offer to the Pandarasannadhi, Exhibit B-1, dated 31st July, 1944, to reclaim the land, offering to pay the temple cash rent or a portion of the crop, after the usual remissions and concessions for the earlier years in such cases of reclamation. He requested to be put in possession of the lands forthwith in order to enable him to take advantage of the concessions offered by the Government regarding the water rate and to raise the crops at once. The revenue authorities strongly recommended his application, holding him up as a man of influence and resources and as one who had built a temple in Madras at his own cost and was maintaining it at great sacrifice. The then Pandarasannadhi was said to have consulted his Advocate at Madras regarding his power to grant the prayer in Exhibit B-1, without any sanction of the Hindu Religious Endowment Board. The Advocate replied that it was within the ordinary powers of his management to grant the prayer. Thereupon the then Pandarasannadhi granted the suit lands on patta to the appellant, after receiving a premium of Rs. 3,000, and delivered the suit lands to the appellant on 21st August, 1944, under Exhibit B-22, in pursuance of his order Exhibit A-3, dated 16th August, 1944. The rate of rent was not fixed in Exhibit A-3 or Exhibit B-22. The appellant was told that no rent was demanded from him for faslis 1354 and 1355, that is, for the first two years. Even in the suit, the rent for those years was not claimed. The then Pandarasannadhi intimated to the H.R.E. Board the orders passed by him in Exhibit A-3, and he said wrongly in that communication, Exhibit A-5, dated 4th October, 1944, that the lands granted were *service tenure* lands. On a further report being called for by the H.R.E. Board, he said that the lands were not service tenure lands, and added that he was himself competent to grant the lease, and that the legal adviser had also told him so on 16th August, 1944, as shown in Exhibit B-24. He then went on to eulogise the efforts of the appellant to reclaim the lands speedily, adding that he had reclaimed 200 acres out of the suit lands within two months, spending at least Rs. 30,000 and a phenomenal amount of time and energy.

Then, on 6th January, 1945, he fixed the rent payable by the appellant for the suit lands at Rs. 3-9-0 per acre, besides the water cess from 1356 fasli, and was proceeding to exchange patta and muchilika with the appellant when, on 8th March, 1945, the H.R.E. Board issued a notice, Exhibit B-6, to him under section 76 of the H.R.E. Act, calling upon him to justify the lease granted to the appellant. He had had correspondence with the H.R.E. Board regarding that matter between October, 1944, and March, 1945. He stated in Exhibit B-10, a statement by him before the H.R.E. Board, that the suit lands were *ryoti lands*, and that the transaction was well within his competence, being in the ordinary course of management as trustee, and that no sanction of the Board under section 76 (1) of the H.R.E. Act was necessary. The Board, however, passed an order, Exhibit A-7, on 27th October, 1945, declaring the lease to the appellant as invalid as being neither necessary nor beneficial to the temple, and that amounted to an alienation by way of sale or permanent lease, requiring sanction of the Board.

On 9th March, 1946, one Rajagopala Ayyar, claiming to be a worshipper in the plaint temple, filed a petition in the District Court under section 76(2) of the H.R.E. Act for quashing the order under Exhibit A-7 as erroneous, illegal and passed without jurisdiction. The appellant denied having set up Rajagopala Ayyar to file that Petition, though the lower Court has opined that he was the man at the bottom of the petition. Whatever it be, the learned District Judge dismissed that petition, stating that it was for the appellant to prove in appropriate proceedings that he had occupancy rights in the suit lands. There the matter rested for the time.

The then Pandarasannadhi died in April, 1951, and the present Pandarasannadhi succeeded him and issued a notice Exhibit A-1, dated 15th June, 1951 through an Advocate, to the appellant, repudiating the lease granted to the appellant by his predecessor and treating the appellant as a person in unauthorised occupation of the temple lands and liable to pay the temple half the crops, the usual waram, but claiming only Rs. 10,418-10-0 for faslis 1357-1360, as per the rent fixed by his predecessor and not claiming for faslis 1354-1355, and stating that the rent for fasli 1356 had been adjusted out of the payments made by the appellant. The appellant not having paid as per the demand, the Pandarasannadhi filed the suit for recovering Rs. 11,415-8-6 the principal and interest.

The appellant contested the suit vigorously. His main contentions were that the suit lands were *ryoti lands* in an estate, and that he had been legally admitted into possession by the previous Pandarasannadhi, the trustee of the temple, and had paid premium and rent, and had perfected his occupancy rights, and that it was well within the rights of the previous Pandarasannadhi, in the course of his management as trustee, to grant such a lease and to let him into possession, and that no sanction of the Board was necessary under section 76 of the H.R.E. Act. He also contended that he had spent three lakhs of rupees on reclamation to the knowledge of the previous Pandarasannadhi, the present Pandarasannadhi and the H.R.E. Board, and that the H.R.E. Board had acquiesced in the previous trustee's letting him into possession under Exhibit A-3 and B-22, and could not now repudiate the lease or deny his right of occupancy. He added that Rs. 1,000 which he had paid towards the rent for the suit Faslis had not been taken into account, though the plaint had alleged that every payment had been taken into account. He contended also that the previous Pandarasannadhi had agreed to waive the rent for Faslis 1357-1359. Finally he urged that the suit would lie only in a *Revenue Court*, under the Estates Land Act, *and not in a Civil Court*, and that the suit by the plaintiff would not also lie in view of the provisions of the Rent Reduction Act XXX of 1947. The learned Subordinate Judge framed the following issues :

(1) Is the defendant a ryot, and is the suit not cognizable by this Court?

(2) What are the terms and conditions of the tenancy?

(3) Is the plaintiff bound by any waiver of rent by the preceding trustees?

(4) What is the amount of rent or damages due?

(5) To what relief, if any, is the plaintiff entitled?

Additional issue.—Whether the plaintiff is not competent to sue in view of the provisions of the Rent Reduction Act XXX of 1947 ?

After discussing the entire evidence, he held, on issues 1 and 2, that there could be no doubt that the suit lands were situated in an estate, as defined in Act I of 1908, as amended by Act XVIII of 1936, and that as they were *cultivable lands*, and had indeed been brought under cultivation by the appellant, they must be deemed to be *ryoti* in character until the contrary was proved by the plaintiff, but that as the suit lands, though cultivable, had remained uncultivated for a number of years and were for the first time being let to the appellant, and there was no proof of necessity for the temple for granting such a lease, or benefit derived by it, it would amount to an alienation of temple property and the previous trustee should have taken the sanction of the Board before granting a lease, and that, in the absence of that, the lease was invalid and the appellant must be held to be only a person in *permissive occupation* of the suit property without acquiring any occupancy rights therein and that, under the terms of the permissive occupation or tenancy, he must pay at the rate of Rs. 3-9-0 per acre on an average for the lands in his possession for each year and would also be liable to eviction, since he was only a tenant at will. On issue 2, he found that the waiver of rent pleaded by the appellant for Faslis 1357 to 1359 was not proved to be true, and that, in any event, the plaintiff was not bound by any such oral promise by the previous Pandarasannadhi. On the additional issue, he found that the plaintiff was entitled to maintain the suit notwithstanding the provisions of the Rent Reduction Act XXX of 1947. On issue 4, he found that the plaintiff was entitled to recover Rs. 10,334-3-0 as damages after allowing for the payments made by the defendant, including the Rs. 1,000 paid by him for Fasli 1358, in the sums of Rs. 500 each and not taken into account in the plaint, even though this amount should have been taken into account for the rent of Fasli 1358 and could not be adjusted towards the rent of Fasli 1356, as the plaintiff claimed to have done, and that too without proof. In the end, therefore, he granted the plaintiff a decree for Rs. 10,334 with subsequent interest and proportionate costs, and dismissed the rest of the suit with proportionate costs.

The defendant has filed the appeal regarding the decree itself and the portion decreed, and the plaintiff has filed the memorandum of cross-objections regarding the Rs. 1,000 disallowed.

We have perused the entire records, and heard the learned counsel on both sides. Only four questions arise for determination in the appeal, *viz.* :

(1) Are the suit lands ryoti lands situated in an estate, or private lands or tank-bed lands, bunds, channels, threshing floors, service tenures, etc., not capable of being ryoti lands ?

(2) Was the appellant admitted to possession of the suit lands, under Exhibit B-22, on 21st August, 1944, and is he entitled to occupancy rights under section 6 of the Estates Land Act ?

(3) Was the previous Pandarasannadhi entitled under the law to grant the lease and admit the appellant into possession, in the ordinary course of his management, without obtaining the orders of the H.R.E. Board ? and

(4) Had the Lower Court no jurisdiction to entertain the suit, and has it to be filed only in a Revenue Court ?

We shall discuss the points seratim below.

Point No. 1—There is absolutely no doubt, in the light of the evidence in the case, that the suit lands are *ryoti lands*, situated in an estate, and are not private lands either *ab initio* or by conversion from ryoti, or tank-beds, bunds, threshing floors, cattle stands, village sites or, service tenures, exempted from the definition of ryoti lands under section 3(16) of the Estates Land Act. The lower Court itself has rightly held, in paragraph 10 of its judgment, that there can be no doubt that the suit lands are situated in an estate as defined in Act I of 1908, as amended by Act XVIII of 1936, and that being cultivable lands, they must be deemed to be ryoti in character until the contrary was proved by the plaintiff. It went on to say that, after the amending Act of 1936, the mere fact that the temple owned both the warams, and that the lands were *iruwaram* lands, would not prevent the appellant from getting occupancy right, if he was properly let into possession by the person entitled to do so. It also rejected the plaintiff's case that the suit lands were home farm lands of the temple, as there was no proof of that, or of any cultivation by the temple itself, prior to 1st July, 1908 or 1st November, 1933, for a continuous period of twelve years. It held also that the temple had not acquired the kudiwaram interest in the lands prior to 1st November, 1933, for valuable consideration. It referred to the Full Bench judgment of this Court *Periannan* v. *A. S. Amman Koil*[1], and the observation of the learned Judges therein that a land can be deemed to be a private land only on proof of the facts mentioned in section 3 (10) of the Estates Land Act. and that mere proof that the landlord was the owner of both the warams was not sufficient to establish the case that the land was private land. It went on to say that the law recognised only two categories of land in an estate, *viz.*, private land and ryoti land, and that the contention of the plaintiff that the suit land must be deemed to be part of old waste land and, therefore, private *pannai* land of the temple, could not be accepted. The learned counsel for the respondent-temple, was unable to attack that finding, which is, in our opinion, the only proper finding in the light of the law and the rulings as they stand.

Private land as defined in section 3 (10), means the domain or home-farm land of the land-holder, by whatever designation known, such as *kambattam*, *khas*, *sir or pannai*, and includes all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the commencement of the Act. The essence of private land is that it was *once cultivated by the landholder himself*, except as regards kudiwaram lands acquired by the landholder before 1st November, 1933, for valuable consideration (which is not the case here) regarding which lands he is given some privileges. The suit lands were admittedly *wholly uncultivated* before they were granted to the appellant on lease and delivered into his possession. So they can never be called home-farm lands or *private lands* at their inception by any stretch of imagination.

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[1] (1952) 1 M.L.J. 71 : I.L.R. (1952) Mad. 741 (F.B.).

It was also not contended that they were ryoti lands converted into private lands, the only way of such conversion recognised by law being by proof of continuous direct cultivation for a period of twelve years prior to 1st July, 1908 or 1st November, 1933, as the case may be, as held in *Periannan* v. *A.S. Amman Koil*[1]. The test applied by another Full Bench ruling of this Court in *Bandara Jogi* v. *Sitaramamurthi*[2], also shows that, in the circumstances of this case, *the suit lands remained ryoti lands*, if they were once ryoti lands, and were not converted into private lands of the temple at any time.

Then the question is whether the suit lands are ryoti lands. We have no doubt whatever that they are ryoti lands as defined in section 3 (16) of the Estates Land Act. The learned counsel for the Respondent urged that, as these lands had not been cultivated for any period before the lease to the appellant and his being admitted into possession, they cannot be termed ' cultivable land '. The contention is wholly unsustainable. " Cultivable " is, of course, quite different from " cultivated ". Any land which can be cultivated systematically will be " cultivable land." The appellant has urged that he had brought the entire suit lands under wet cultivation by the time of the suit, spending three lakhs of rupees for reclamation. There is no reliable evidence to show that any part of the suit lands remained uncultivated at the time of the suit, much less that any portion of it was *uncultivable*. The lower Court has held that all the suit lands were *cultivable*, though they had remained *uncultivated* for a number of years, and that it is undoubtedly the correct conclusion from the evidence.

The Privy Council has held, in *Naganna Naidu* v. *Pitchayya*[3], that pasture land, which had remained uncultivated so far, but which could be reclaimed and brought under cultivation, would, when granted on lease, entitle the lessee to occupancy rights, as such land would be " cultivable land" under section 3 (16) of the Estates Land Act, and therefore ryoti land. There is no ruling to the contrary. The learned counsel for the respondent-plaintiff relied on a ruling of Krishnan, J., in *Subbayya* v. *Sri Venkataramayya Appa Rao Bahadur*[4], where the learned Judge held that a *waste land* in an estate, which used to be *usually submerged in water* in the rainy season, and was not cultivated at all at any time, could not be termed to be ryoti land entitling an unauthorised person, who occupies it casually and cultivates it off and on, to rights of occupancy. But that ruling relates to lands which are not ordinarily and systematically cultivable, though some *catch* crop can be got *now and then* by expending an inordinate amount of labour and money on it. That ruling can therefore have no relevancy to a case like this or to a case of fine cultivable lands like the suit lands, all of which have been brought under wet cultivation under the Caveri-Mettur Project. The proof of the pudding is in the eating, and, when the lands have been fully cultivated, it is not permissible to argue that they are not cultivable

Nor can it be said that any portion of the suit land is covered by the exceptions in section 3 (16), like tank-beds, tank bunds, drainage channels, irrigation channels, threshing floors, cattle stands, village sites, service tenures, etc. That plea was not raised in the written statement and was only referred to by the lower Court itself, by referring to some entries in the registers, and without any evidence in support of them. We are satisfied that the contention cannot stand. It is significant that no ryot having lands under the alleged tank or irrigation channel, whose bed is said to be included in the suit lands, ever objected to the lease to the appellant or the cultivation of the suit lands by him. It is a eleventh-hour argument trotted out by the respondent's counsel taking advantage of the observations in the lower Courts' Judgment. We may add that the Privy Council, in *Pattabhirami Reddi* v. *Balarama Reddi*[5] reaffirmed its views in the earlier decision in *Naganna Naidu* v. *Pitchayya*[3], regarding

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1. (1952) 1 M.L.J. 71: I.L.R. (1952) Mad. 741 (F.B.).
2. (1947) 2 M.L.J. 263.
3. (1929) 57 M.L.J. 654 : L.R. 56 I.A. 346 : I.L.R. 52 Mad. 797 (P.C.).
4. (1924) 47 M.L.J. 469.
5. (1950) 1 M.L.J. 458 : L.R. 77 I.A. 104 : I.L.R. (1950) Mad. 959 (P.C.)

uncultivated pasture lands being ryoti lands capable of founding occupancy rights, if those pasture lands are *cultivable*. Of course, there are some lands in an estate which are not cultivable at all, like hill tops, permanently submerged lands, etc. and they will be incapable of being claimed as *ryoti lands*, with occupancy rights, by lessees for grazing, fishing, etc.

Point No. 2.—That the appellant was admitted into possession of the suit lands on 21st August, 1944, under Exhibit B-22, in pursuance of Exhibit A-3, is proved beyond all doubt, and is indeed, not disputed. The appellant also paid Rs. 2,500 as rent towards the suit lands besides a premium of Rs. 3,000 that too is not disputed, the plaintiff himself having given credit to Rs. 1,500 out of the rents paid, to the suit faslis, though not to the balance of Rs. 1,000. It is also seen that rent for the suit lands was demanded from the appellant by the revenue inspector, under Exhibit B-21, on 30th October, 1950. So, it is clear that the appellant would get *occupancy rights* in these *ryoti lands*, provided the person who admitted him into possession had a right under the law to do so.

Point No. 3.—There is little doubt in our mind that in the case of such ryoti lands remaining uncultivated, a trustee has himself powers, in the ordinary course of his management to let a tenant into possession, even though the consequence of it would be that the tenant would acquire occupancy rights and that there is no need for him to obtain the orders of the H.R.E. Board, it being not *an alienation of trust property* or even a permanent or long lease of private or pannai lands. In *Narayanaswami Naidu* v. *Subramaniam*[1], a Bench of this Court has held that the term "landholder" in section 6 of the Act includes a Receiver appointed to manage the estate, and that the Receiver can let a tenant into possession of cultivable lands in the estate, as such power would ordinarily be included in the powers of management. In *Kallalagar Devasthanam* v. *Antony Moopan*[2], it was held that a trustee could let a tenant into possession of cultivable land in the estate of a temple and that that power could be exercised in the ordinary course of his management,and that the word "landholder" in section 6 (1) of the Madras Estates Land Act does not mean the same thing as " land-owner". In *Pattabhirami Reddi* v. *Balarama Reddi*[3], the Privy Council went further and held that even *de facto* trustees could let tenants into posession and enable them to acquire permanent rights, if they had the tacit assent of the *de jure* trustees as well as of the H.R.E. Board, who must be deemed to have acquiesced in such a lease by keeping silent when action was demanded. The Privy Council decision was in reversal of the decision of this Court in that case, reported in *Pattabhirami Reddi* v. *Balarama Reddi*[4], holding the contrary. It is obvious that the decision of the Privy Council would apply to the facts of this case also, though there is no need to import the theory of acquiescenee and tacit assent of the H.R.E. Board, by its failure to take action for some time and by the action of the present trustee, even in this suit, acting on the terms of the lease to the appellant regarding the rate of rent, and non-demand of any rent for the first two years, and adjusting the rent paid under the lease, and failure to ask for possession, reserving it for future proceedings. In *Mahant Mahabir Das* v. *Udit Narayana Varma*[5], a Bench of the Patna High Court has held that a Receiver appointed by Court has got the right to let a tenant into possession of cultivable land and enable him to acquire permanent rights, under the Bihar Tenancy Act, and that such a power would be within his ordinary powers of management.

Nor were there any special circumstances making it incumbent on the previous Pandarasannadhi to refer the matter to the H.R.E. Board for its sanction. The temple had no funds to reclaim the lands under section 6 (4) and section 26 of the Estates Land Act. The revenue authorities and the H.R.E. Board were pressing the temple to have the lands reclaimed by some suitable person in pursuance of the grow-more-food campaign and World War II, which made growing of more food indispensable in national interests. There was, therefore, no need for the then trustee to refer the

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1. (1915) 29 M.L.J. 478 : I.L.R. 39 Mad. 683.
2. (1924) 48 M.L.J. 147.
3. (1950) 1 M.L.J. 458 : L.R. 77 I.A. 104 : I.L.R. (1950) Mad. 959 (P.C.).
4. (1944) 2 M.L.J. 326.
5. (1938) I.L.R. 17 Pat. 594.

matter to the H.R.E. Board for sanction as a special case. The fact that he did so without any need would not avail the plaintiff-respondent, as, later on, he himself contended before the H.R.E. Board that he had the power to grant the lease, and that no sanction of the Board was necessary, and the Board had a prolonged correspondence with him about it and did nothing at all till he died, and even after his death allowed the next trustee to act on the terms of the lease regarding non-claim of rent for two years, and claim of rent at the rate agreed to by the previous trustee for the remaining years, and adjustment of rent already received towards the claim in the suit.

The learned counsel for the plaintiff-respondent relied on the ruling in *Veerayya* v. *Venkata Bhashyakarla Rao*[1]. That ruling will have no application to this case, as there it was a case of trustee's converting *home-farm lands* into ryoti lands for getting a substantial payment in cash and so it was held to be not binding on the estate without sanction. Here, it is merely a question of putting a tenant in possession of *ryoti lands*, which had remained uncultivated so far, for the purpose of getting them cultivated and realising a good additional income for the temple.

Finally the learned counsel for the plaintiff-respondent relied on a ruling of the Supreme Court in *Lakshmana* v. *Ramier*[2]. That too will not help him. There it was merely held that a person cannot grant a right which he has no power to grant. But, here, we have already seen that the trustee had the power to let the appellant. into possession of the suit lands, which were ryoti lands, though remaining uncultivated so far, without obtaining the sanction of the H.R.E. Board and of his own accord, that being within the ordinary powers of his management. So, he granted only what he had power to grant and the Supreme Court ruling cannot have any application.

Point No 4.—There is no doubt whatever, in view of the findings on points 1 to 3 above, that this suit would only lie in a *revenue Court*, and could not be entertained by the lower Court a *civil Court*. It is not a case of a contract under which ryoti land is allowed to be used for non-agricultural purposes, and the civil Court has therefore jurisdiction. It is a case of a tenant being admitted to *ryoti lands* for *agricultural purposes*, viz., reclamation and cultivation. In that view, the plaint will have to be returned to the plaintiff for presentation before the proper Court, *viz.*, the concerned revenue Court, and we set aside the judgment and decree of the lower Court, and direct the plaint to be returned to the plaintiff for presentation to the proper Court, *viz.*, the appropriate revenue Court. As we are doing that, there is no need for us to consider whether the rent at Rs. 3-9-0 per acre, demanded from the defendant in this suit, is the proper rent, and is payable for the entire extent, or whether only the rent payable under the provisions of the Rent Reduction Act XXX of 1947 will be payable, and that too for the extents cultivated actually in each fasli as contended by the appellants counsel even if the total remission story for Faslis 1357 to 1359 is rejected. All these matters will have to be gone into and decided by the revenue Court, the only competent Court to hear and decide them, when the plaint is presented there afresh.

The memorandum of cross-objections filed by the plaintiff relates to Rs. 1,000 paid in 1950-1951 and claimed to have been adjusted to Fasli 1356 but disallowed by the lower Court. We have no hesitation whatever in agreeing with the lower Court that this sum of Rs. 1,000 paid by the defendant in 1950 and 1951 towards the rent of Fasli 1358, as per the plaintiff's own accounts, was not adjusted in the plaint, though it was stated that it was adjusted. The learned counsel for the plaintiff was not able to show from the accounts that it was adjusted to Fasli 1356, or how it could be adjusted to that fasli when paid for Fasli 1358. He did not produce any entries proving the adjustment to Fasli 1356, much less prove that it was properly adjusted to that fasli. Indeed, he was not able to show us how the lower Court has gone wrong at all on this point. The memorandum of cross-objections, therefore, has to be and is hereby dismissed with the costs of the defendant-appellant.

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1. A.I.R. 1936 Mad. 887.
2. (1953) S.C.R. 848 : 1953 S.C.J. 420 : (1953) 1 M.L.J. 834 : A.I.R. 1953 S.C. 304 (S.C.).

In the appeal, the plaintiff-respondent will pay the defendant-appellant his costs, excluding the Court-fee on the appeal Memo. which will be refunded to the appellant. The costs in the suit will be provided for when it is disposed of (afresh) by the revenue Court.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Konthalavalli Achi .. *Appellant**

v.

T.B. Ayyathurai Odayar and others. .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 9-*A* (10) (ii) (*a*) *and* (*b*)—*Exemption under—Devolution by transfer* inter vivos—*What amounts to—If includes Court auction sales.*

Sub-section (10) of section 9-A of the Madras Agriculturists' Relief Act as amended by the Amending Act of 1948 and subsequent Acts is in the form of an exception to the main provision in section 9-A. The devolution by transfer *inter vivos* referred to in section 9-A (10) (*ii*) (*a*) of the Act is restricted only to cases of devolution by transfer *inter vivos* and does not include transfers by operation of law as in Court sales. Hence a Court auction-purchaser is not entitled to the benefit of exemption under sub-section (10) (*ii*) (*a*) of section 9-A of the Act. The creation of a sub-mortgage by a mortgagee is not a transfer of the mortgagee's interest in part within the meaning of section 9-A (10) (*ii*) (*b*) of the Act.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O.S. No. 112 of 1954.

R. Sundaralingam for Appellant.

R. Gopalaswami Ayyangar, G. R. Jagadisan and *V. Ratnam* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal and the memorandum of cross-objections arise out of a decree for redemption of a usufructuary mortgage passed in suit O.S. No. 112 of 1954 on the file of the Subordinate Judge, Tanjore. It raises for consideration the proper construction of certain provisions of the Madras Agriculturists Relief Act, 1938, to which I will immediately refer.

The facts are not in controversy and the only question is the amount payable for redemption of the suit property and this turns on the construction of section 9-A (10) of the Madras Agriculturists Relief Act, 1938. One Kandaswami Udayar was the original owner of the properties now in suit. On 26th April, 1927, he executed a usufructuary mortgage in favour of the 1st defendant for Rs. 6,000 and this is the mortgage which is now sought to be redeemed. The mortgage contained a clause enabling the mortgagor to repay the money within three years and redeem the property. It is common ground that this usufructuary mortgage was followed by a lease back of the property to the mortgagor at a rental of 210 kalams of paddy per year from the date of the othi and that the mortgagor and his heirs have been in possession and enjoyment of the property since that date as lessees. The day after the usufructuary mortgage I have referred to, that is on 27th April, 1927, Kandaswami effected a simple mortgage of the same properties in favour of one Janaki, daughter of the 1st defendant. The amount due on this simple mortgage was not paid when due and this mortgagee brought O.S. No. 273 of 1941 on her mortgage, obtained a decree and brought the suit hypotheca to sale. The properties were sold and in the Court sale which was held on 24th April, 1945, the equity of redemption inhering in the mortgagor, was purchased by the plaintiff for Rs. 3,000, the purchase being subject to the usufructuary mortgage now sought to be redeemed. On 27th June, 1945, the sale was confirmed and a sale certificate was issued in favour of the plaintiff. Kandaswami died in or about 1946 and the present suit has been filed on 29th November, 1954, for redemption of the usufructuary mortgage, dated 26th April, 1927, the plaintiff claiming to be an agriculturist and seeking the benefit of the scaling down provisions of Madras Act IV of 1938. I might at once mention that the claim of the plaintiff to be an agriculturist is not in controversy.

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*Appea No. 164 of 1946. 16th August, 195 .

To this suit eight persons were impleaded as defendants. The first defendant was the usufructuary mortgagee under the mortgage of 1927 and defendants 2 and 3 were the sons of Kandaswami born subsequent to 1927 who were said to be in possession of the suit property. The 4th defendant is a lessee from defendants 2 and 3. The 5th defendant is said to be a subsequent purchaser from the 2nd defendant but whose purchase was *pendente lite* the mortgage suit O. S. No. 273 of 1941. Defendants 6 and 7 are stated to claim certain rights in the property while the 8th defendant who was impleaded by order, dated 6th July, 1955, is a sub-mortgagee from the 1st defendant, the mortgage in his favour being simple.

The learned Subordinate Judge has applying the scaling down provisions enacted by Madras Act IV of 1938 decreed to the plaintiff redemption of the suit usufructuary mortgage on condition of the plaintiff paying Rs. 400 towards the principal together with interest on Rs. 6,000 at 5½ per cent. per annum for a period of three years prior to suit, *viz.*, Rs. 990 and subsequent interest till the date of deposit.

It will now be convenient to set out the relevant provisions of the Madras Agriculturists Relief Act by applying which the Subordinate Judge has arrived at these figures. In the Madras Agriculturists Relief Act as orginally passed in 1938 usufructuary mortgages were outside its scope and not subject to any scaling down, since section 10 (2) of the Act enacted :

> " Nothing contained in sections 8 and 9 (which scale down interest due on debts due by an agriculturist) shall affect—(*i*) any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee ".

But this however was varied by the introduction of section 9-A by the Amending Act XXIII of 1948. Section 9-A itself has undergone several modifications but it is unnecessary to refer to these and it is sufficient to notice the form in which the section stood on the date of the suit. The relevant portions of section 9-A which bear upon the matters in controversy in this appeal I shall now set out.

> " 9-A (1). This section applies to all mortgages executed at any time before the 30th September, 1947 and by virtue of which the mortgagee is in possession of the property mortgaged to him or any portion thereof—
>
> (*a*) where no rate of interest is stipulated for as due to the mortgagee, or
>
> (*b*) where a rate of interest is stipulated for as due to the mortgagee in respect of the principal amount secured by the mortgage or any portion thereof, in addition to the usufruct from the property or in respect of any other sum payable to the mortgagee by the mortgagor in his capacity as such.
>
> *Explanation.*—A mortgagee shall be deemed to be in possession of the property mortgaged to him or any portion thereof, notwithstanding that he has leased it to the mortgagor or any other person.
>
> (2) The mortgagor shall be entitled to redeem the whole of the property mortgaged, notwithstanding that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived.
>
> (3) Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of less than thirty years, the mortgagor shall not be entitled to redeem the mortgage, unless he pays to the mortgagee.
>
> (*i*) the difference between the principal amount secured by the mortgage and an amount bearing to the principal amount the same proportion as the period during which the mortgagee has been in possession bears to thirty years ;
>
> (*ii*) where any interest on the principal amount secured by the mortgage or any portion thereof has been stipulated for, in addition to the usufruct from the property, the arrears of such interest of scaled down under section 8 or 9 read with section 12, or under section 13, as the case may be ; and
>
> (*iii*) all other sums payable to the mortgagee by the mortgagor in his capacity as such, together with the interest, if any, due thereon.
>
> (4) . . . .
>
> (5) Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years or more, then, notwithstanding anything contained in sections 8, 9, 12 and 13, the mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the period of thirty years or where such period expired before the commencement of the Madras Agriculturists Relief (Amendment) Act, 1948, with effect from the commencement of that Act—
>
> (*i*) if no interest has been stipulated for on the principal amount secured by the mortgage or any portion thereof, in addition to the usufruct from the property ;
>
> (*ii*) where such interest has been stipulated for, if no arrears of interest are due from the mortgagor ; and

(*iii*) if no other sums or interest thereon are due to the mortgagee by the mortgagor in his capacity as such.

(*b*) Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of thirty years or more, then, in cases not governed by clause (*a*) the mortgagor shall not be entitled to redeem the mortgage unless he pays to the mortgagee.

(*i*) the arrears of interest stipulated for in addition to the usufruct from the property, as scaled down under section 8 or 9 read with section 12, or under section 13, as the case may be ; and

(*ii*) all other sums due to the mortgagee by the mortgagor in his capacity as such and referred to in sub-clause (*iii*) of clause (*a*) together with any interest due thereon

(9) (*a*) (*i*).—Except in cases falling under sub-section 5 (*a*) where the mortgaged property or, as the case may be, the portion thereof in the possession of the mortgagee has been leased back to the mortgagor by the mortgagee, the rent due to the mortgagee under the lease (after deducting from such rent any revenue tax or cess paid or payable by the mortgagee in respect of the property) shall be deemed to be the interest on the mortgage debt or the portion thereof attributable to the portion of the property aforesaid and the provisions of section 8 or 9 read with section 12, or of section 13, as the case may be, shall apply to the entire debt.

(*ii*) Nothing contained in sub-section (3) or sub-section (4) shall apply to any debt falling under sub-clause (*i*).

(*b*) In cases falling under sub-section (5) (*a*), where the property has been leased back to the mortgagor by the mortgagee, nothing contained in that sub-section shall affect the right of the mortgagee to recover any rents due to him under the lease for any period before the date on which the mortgaged debt is deemed to have been wholly discharged by virtue of that sub-section, if such rents have not become barred by limitation under any law for the time being in force.

Sub-section (10) of this section is the crucial provision whose construction is involved in this appeal. That sub-section is in the form of an exception to the main provision in section 9-A. It runs :

(10) Nothing contained in this section, except sub-sections (1) and (2) shall apply to any mortgage.

(*i*) in respect of property situated in the South Kanara district or in the taluks of Chirakkal Kottayam, Kurumbranad and Wynaad in the Malabar district ;

(*ii*) in respect of property situated in any other area in the cases mentioned below—

(*a*) Where during the period after the 30th September, 1937 and before the 30th January, 1948, the equity of redemption in the property subject to the mortgage has devolved either wholly or in part on a person, by or through a transfer *inter vivos* either from the original mortgagor or from a person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos*, then to the whole or such part, as the case may be.

(*b*) Where, during the period aforesaid, the mortgagee or any of his successors-in-interest has transferred either wholly or in part mortgagee's right in the property *bona fide* and for valuable consideration, then, to the whole or such part, as the case may be :

Provided that the transferee of a mortgagee shall not be entitled to recover in respect of such mortgage, anything more than the value of the consideration for the transfer ; but nothing herein contained shall in cases where the property or portion thereof has been leased back to the mortgagor, affect the right of the transferee to recover the rents, if any, due under the lease, if such rents have not become barred by limitation under any law for the time being in force.

(*c*) Where the mortgagee's interest in the property subject to the mortgage or any part of such interest belonged to, or devolved on, two or more persons and during the period aforesaid, a partition has taken place among such persons, then, to the whole or such part of the interest as the case may be ".

The facts narrated above would in the light of the provisions of the enactment set out lead to the following results: (1) The mortgage in question was a usufructuary mortgage under which the mortgagee was deemed to be in possession by virtue of the *Explanation* to section 9-A (1). (2) The mortgage was executed within the dates named in the sub-section (1) and was therefore subject to the principal amount being scaled down. Under sub-section (8) the usufructuary mortgage was less than 30 years old at the time when the mortgagor sought redemption, the mortgage having been executed in 1927. (3) If the provision for scaling the principal amount laid down by sub-section (3) applied, the mortgagor was bound to pay only 2/30 of Rs. 6,000 that it is Rs. 400 as the principal amount. (4) If there was any arrear of rent due to the mortgagee-lessor the amount due would be determined on the basis of sub-section (9-*a*) and in the present case having regard to the principal sum, 5½ per cent. per annum interest on Rs. 6,000 for the last three years, if arrears were due for that period would be the additional sum due on the mortgage. This is the basis, upon which the Court has proceeded and so far as the calculations are concerned, there is no dispute.

There are, however, two points raised one by the appellant-mortgagee and the other by the mortgagor-1st respondent. The point raised by the appellant is that the scaling down provisions under section 9-A are inapplicable to the present case by reason of (1) the equity of redemption belonging to the mortgagor having been purchased by the plaintiff in Court auction in execution of the decree in O.S. No. 273 of 1941, the contention being that this is a case where during the period after the 30th September, 1937 and before the 30th January, 1948, the equity of redemption in the property subject to the mortgage has devolved on a person "by or through a transfer *inter vivos* from the original mortgagor" within sub-section (10) (*ii*) (*a*) of the Act and (2) of the alienation by way of sub-mortgage by the 1st defendant of her mortgage interest in favour of the 8th defendant constituting a transfer by the mortgagee of the mortgagee's rights in the property "*bona fide* and for valuable consideration" within the period 30th September, 1937 and 30th January, 1948 and falling within the exception laid down in sub-section (10) (*ii*) (*b*). These are the two points raised by the mortgagee-appellant. The mortgagor-1st respondent has filed a memo. of cross-objections questioning the correctness of the addition of Rs. 900 in the amount payable for redemption as arrears of rent due to the mortgagee-lessor. I shall now deal with these points in that order.

The question whether the purchase of the equity of redemption by the plaintiff in Court auction constitutes a transfer *inter vivos* within sub-section (10) (*ii*) (*a*) is the first point to be considered. This was debated in the Court below and the Subordinate Judge held that the plaintiff was not within the exception on the ground that a purchase in Court auction was not a " transfer *inter vivos* " within the meaning of the provision. In reaching this conclusion, the Subordinate Judge relied on a decision of Krishnaswami Nayudu, J., in *Benjamin* v. *Devadoss*[1]. The point urged before me was that the decision in *Benjamin* v. *Devadoss*[1], which construed the words "transfer *bona fide* and for valuable consisderation" in sub-section (10) (*ii*) (*b*) had been mis-applied to construe the words " transfer *inter vivos* " within sub-section (10) (*ii*) (*a*). The relevant words of sub-section (10) (*ii*) (*a*) I shall quote again, *viz.*,

> "where . . . . . the equity of redemption in the property subject to the mortgage has devolved either wholly or in part on a person, by or through a transfer *inter vivos* either from the original mortgagor.."

Learned counsel for the appellant and Mr. Jagadisa Ayyar who appeared for the 8th defendant and supported the appellant laid great stress upon the use of the expression " devolved " in the sub-section as having a wider import than the word " transfer " and so capable of including a transfer *in invitum*. But I am however unable to agree that in the context the sub-section includes such a transfer. " Devolution" might no doubt include "transfers by operation of law" but that depends upon the context. The "devolution" here spoken of is not one simpliciter but comprises only that which takes place " by or through a transfer *inter vivos*." Unless therefore a transfer involved in Court sale can be comprehended within the expression "transfer *inter vivos*"the devolution referred to earlier cannot include such a transfer. The decision of Krishnaswami Nayudu, J., in *Benjamin* v. *Devadoss*[1], no doubt construed the words "transfer *bona fide* and for valuable consideration" in sub-section (10) (*ii*) (*b*). But in my judgment the reasoning of the learned Judge would equally apply to the construction of the expression " transfer *inter vivos*" in sub-clause (*a*) of the sub-section. In fact the argument addressed to the learned Judge was that as sub-section (10) (*ii*) (*b*) did not use the words " transfer *inter vivos* " but referred only to transfers generally, sub-section (*b*) should be held to comprehend sales in Court auction and it was this argument that he repelled. I respectfully agree with the conclusion reached by the learned Judge that the expression "transfer *inter vivos*" would exclude sales in Court auction. The argument, thereore, that the plaintiff was a person to whom the scaling down provisions in the main portions of section 9-A would be inapplicable by reason of the exclusion contained in sub-section (10) (*ii*) (*a*) was correctly rejected by the learned Subordinate Judge.

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[1] (1954) 1 M.L.J. 537.

I shall next proceed to consider the applicability of sub-clause (*b*) of sub-section (10) (*ii*) by reason of the mortgagee effecting a sub-mortgage in favour of the 8th defendant by way of a simple mortgage of her usufructuary mortgage rights. This was not raised in the Court below either by the 1st defendant the usufructuary mortgagee or by the 8th defendant after he was impleaded. So far as these defendants were concerned— and they were the parties who were interested in this point—the suit proceeded merely on endorsements on the plaint made by the respective parties on 30th August, 1955. The endorsements of the plaintiff's counsel was that the mortgagee had leased out the lands to the mortgagor from the date of the othi and that the mortgagor and after his death his sons had been enjoying the properties as lessees. The 1st defendant's counsel stated by his endorsement that he had no objection to the amount determined as payable for the redemption of his client's mortgage being paid over to the 8th defendant. Counsel for the 8th defendant supported this statement by an endorsement in which he stated that his client was entitled to the amount declared as payable to the 1st defendant. Even in her grounds of appeal to this Court, the 1st defendant did not specifically raise this point about the simple mortgage in favour of the 8th defendant excluding the applicability of section 9-A and it was only during the hearing of the appeal and particularly in the argument of Mr. Jagadisa Ayyar learned counsel for the 8th defendant, who supported the appellant, that this point was specifically urged. As I considered that the point raised was purely one of law, I directed the point to be argued. The argument however both by learned counsel for the 8th defendant as well as by Mr. Gopalaswami Ayyangar learned counsel for the mortgagor-1st respondent proceeded upon the basis that the sub-mortgage in favour of the 8th defendant was effected between 30th September, 1937 and 30th January, 1948. But after judgment was reserved I found that the written statement of the 8th defendant had not set out the date of this sub-mortgage. This ran :

> " This defendant is a sub-mortgagee of the othi properties sought to be redeemed by the plaintiff. The amount due at present under the mortgage executed in his favour by the 1st defendant and her daughter exceeds Rs. 13,000. This defendant as a mortgagee of the 1st defendant's othi right is entitled to be paid whatever sum is found by the Court to be payable by the plaintiff for redemption of the othi ".

No evidence was recorded in the suit except a formal proof of the mortgage by the plaintiff which was necessitated by some of the defendants being *ex parte*. There was nothing therefore on the record on the basis of which it could be held that the alienation by way of sub-mortgage was between the dates mentioned in sub-section (10)(*ii*) (*b*). I, therefore posted the appeal for being mentioned and pointed out this lacuna to learned counsel appearing in the case. Thereupon Mr. Jagadisa Ayyar, learned counsel for the 8th defendant filed an application C.M.P.No. 5776 of 1956 for the reception of the simple mortgage by the 1st defendant, as additional evidence in the appeal.

In the affidavit in support of this application for the reception of additional evidence the 8th defendant stated that he had orginally been declared *ex parte* but that subsequently the order was set aside that when he filed the written statement it was done in a hurry and that the original mortgage deed which had been sent to the advocate at Tanjore had not been filed into Court since there was no controversy regarding the transaction. This original document dated 19th April, 1941 has now been filed into Court for being admitted in evidence. The plaintiff 1st respondent in the appeal has opposed this application but an examination of the affidavit filed by him would show that the objection is not so much to the reception of this document as to permitting the 8th defendant or the 1st defendant to raise the point that by reason of this simple mortgage executed by the 1st defendant, the terms of sub-section (10) (*ii*) (*b*) are attracted. In the circumstances stated by the 8th defendant in his affidavit, I consider that this is a proper case in which the document should be admitted in evidence as there has never been any dispute about the genuineness of the transaction. I cannot see any objection to the date of the simple mortgage being made clear by this evidence. Of course it would be open to the plaintiff 1st respondent to contend that even if the simple mortgage is proved—a matter which was never in doubt—it does not entitle the 1st defendant or 8th defendant to claim the benefit of the exclusion provided by sub-section (10) (*ii*) (*b*). C.M.P. No. 5776 of 1956 is allowed and the document filed therewith will be admitted as additional evidence in the appeal.

The lacuna having been cleared I shall now proceed to consider whether the sub-mortgage by way of a simple mortgage by the mortgagee is a transfer by the mortgagee of her rights in the properties within sub-section (10) (*ii*) (*b*). Though at the time when this matter was originaly argued before me the arguments proceeded upon the point raised being *res integra* learned counsel for the 1st respondent has now brought to my notice that this question was considered by a Bench of this Court consisting of Govinda Menon and Ramaswami, JJ., in S.A. No. 133 of 1952 (*Rajagopal Naidu* v. *Sivakami Ammal*), where the learned Judges have held that the words 'transfer in part of the mortgagee's rights' within that sub-clause would cover only an absolute conveyance of the entirety of the mortgagee's interests and not the creation of a subsidiary interest such as a sub-mortgage involves. In view of the decision of this Bench which affirmed the correctness of a judgment of Ramaswami, J., sitting singly in *Velu Mudaliar* v. *Rajaram Karayalar*[1], taking a similar view of this provision I do not consider it necessary or useful to go over the ground again :

I have therefore to hold that the terms of neither sub-section (10) (*ii*) (*a*) or (10) (*ii*) (*b*) are attracted to the present case, and that the mortgage debt would have therefore to be scaled down in accordance with sub-section (3). There is no dispute that if the mortgage debt is scaled down in accordance with this provision, the amount due to the mortgagee would be Rs. 400.

The correctness of the decision of the Subordinate Judge in allowing the mortgagee a sum of Rs. 900 towards the rent due for the last three years which is raised by the memo. of cross-objections filed by the mortgagor is the only remaining question to be considered. The 1st defendant in her written statement stated in paragraph 5:

> "This defendant submits that the rent from the properties has remained un-paid from 19th April 1945 till 1953-54 and in any event even if the debt is scaled down this defendant is entitled to claim the amount from the plaintiff before he is entitled to redeem"

and repeated this allegation in paragraph 7. This statement was filed in January, 1955. The endorsements on the plaint to which I have already referred were made in August, 1955. At the time of the endorsements though the plaintiff admitted the lease-back there was no admission by him that any rent was in arrear ; nor did the 1st defenant's advocate in the endorsement which he made on the plaint raise any point as regards any arrear of rent. As I have said earlier, the suit was tried only on the basis of the endorsements without any evidence being recorded except of a very formal nature. I am mentioning this for the purpose of emphasising that the 1st defendant did not lead any evidence or place any materials before the Court in support of her allegations in paragraphs 5 and 7 of the written statement to which I have adverted. Therefore the Court below had nothing before it on the basis of which it could hold that there was any arrear of rent due under the lease-back. There is no presumption in law that the rent due under a lease is in arrear. The Court below however passed a decree for the arrears due on grounds which do not appear to me very intelligible. The matter is dealt with in paragraphs 8 and 9 of the judgment. The Subordinate Judge assumes in this discussion that the 1st defendant had established the case pleaded by her in her written statement in the paragraphs which I have extracted above, namely, that the rent under the lease-back had not been paid from 1944 to the date of the plaint. On this asssumption the Court below proceeds to ascertain the period for which a claim could now be made and the quantum of the rent which could be claimed in the light of the provisions of the Agriculturists Relief Act. Mr. Gopalaswami Ayyangar, learned counsel for the 1st respondent complains that the learned Subordinte Judge was not justified in basing his decision on an assumption that there were arrears without there being any evidence therefor. I consider this objection well-founded and learned counsel for the mortgagee-appellant has not been able to refer me to any evidence to support this assumption. I have already mentioned that the trial proceeded merely on the endorsements on the plaint, so far as the contesting defendants 1 and 8 were concerned and there was merely formal proof of the mortgage and the title of the plaintiff in the evidence of the plaintiff as P.W. 1. I will only add that when the plaintiff was in the witness-box the mortgagee did not seek to elicit from him that there were any arrears of rent due under the lease-back.

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[1] (1955) 69 L.W. 248.

The argument of learned counsel for the mortgagee-appellant however was that the finding of the learned Subordinate Judge as regards the existence of arrears of rent must have proceeded on some admission of counsel for the plaintiff before the lower Court. I am unable to find any basis to support this theory nor to infer this from the mere fact that there was an argument before the Court as regards the period for which a decree for arrears of rent could be passed or as regards the basis of the computation of the sum, due, on that account. I am further reinforced in this conclusion by the circumstance that the trial of the suit was taken up on the 30th August, 1955 and concluded on the 1st September, 1955,having adjourned thereto from 30th on which latter date the only thing done was that P.W. 1 was examined ; and the endorsements were made on 30th August, 1956. It is therefore impossible that there could have been an admission at the trial by the parties or their advocates regarding matters not covered by the endorsements on 30th August, 1955 and the existence of the arrears of rent was not one such matter.

The result is that the memo. of cross-objections has to be allowed and the addition of Rs. 990 in the amount to be paid for redemption deleted.

The appeal is accordingly dismissed with costs of the plaintiff-1st respondent and the momorandum of objections allowed. There will however be no order as to costs in the memorandum of objections.

R.M. ——— *Appeal dismissed and cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

K. Syamalambal .. *Appellant**

v.

N. Namberumal Chettiar .. *Respondent.*

Torts—Wrongful attachment—Damages for—Basis of claim—Trespass and abuse of civil process—Differences in.

The claim of a person for damages for wrongful attachment of property can fall under two heads—(1) trespass and (2) abuse of civil process. Where property belonging to a person, not a party to the suit, is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for abuse of process. In the case of abuse of process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case the plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary.

On appeal from the Judgement and decree of the Honourable Mr. Justice Krishnaswami Nayudu dated 17th October, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 216 of 1948.

T. R. Srinivasa Ayyangar for Appellant.

S. Thyagaraja Ayyar and *S. Krishnamurthi* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal arises out of a suit filed by the appellant for the recovery of a sum of Rs. 10,300 from the defendant as damages for unlawful attachment of her properties. The material facts which are beyond controversy are: The defendant obtained a decree against one Peruri Suryaprakasam on 9th May, 1934, in C.S. No. 166 of 1934 on the Original Side of this Court. On 11th January, 1935 the suit properties among others were transferred by the said Suryaprakasam to one P. Venkatasubba Rao. The defendant in execution of the decree obtained by him attached the suit properties. Venkatasubba Rao filed a petition under Order 21, rule 58 of the Code of Civil Procedure claiming the properties on the strength of his purchase. The petition was allowed in his favour. As against this order the defendant filed a suit, O.S. No. 171 of 1940, in the Subordinate Judge's Court of Chingleput. Meanwhile, on the 15th January, 1940, there was an agreement to sell the suit properties by Venkatasubba Rao in favour of one Murugesa Mudaliar. This was one day prior to the order of precept issued by this Court in the execution application filed by the defendant. The actual attachment was made on 19th January, 1940. The sale deed was eventually executed by Venkatasubba Rao in favour of Murugesa Mudaliar on 1st July, 1940. The plaintiff therefore made Murugesa Mudlaliar also a defendant in his suit, O.S. No. 171 of 1940. The learned Subordinate Judge held that though the transfer of the properties by the judgment-debtor Suryaprakasam to Venkatasubba Rao was intended to defraud the creditors, Murugesa was a transferee in good faith for consideration. On this finding the suit was dismissed. The defendant preferred an appeal to this Court A.S. No. 289 of 1944. The appeal was dismissed by this Court which found that the sale in favour of Murugesa Mudaliar was a *bona fide* transaction not liable to be set aside and therefore the properties were not liable to be attached in execution of the defendant's decree. But the Court made the following observations:

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* O.S. Appeal No. 30 of 1952. 16th August, 1956.

> "While holding that the two villages cannot be directly attached by the plaintiff in execution of his decree we leave it open to the plaintiff to contend in future proceedings that he can execute his decree against that portion of the purchase price which was paid (by Murugesa) or to be paid after the attachment".

The Judgment of this Court in appeal was delivered on 13th November, 1945. Meanwhile the properties had been conveyed by the heirs of Murugesa Mudaliar who had died, to two persons, T. Doraiswami Mudaliar and Pappu Chetty Lakshminarayana, by two sale deeds, dated 27th October, 1945. Within two months thereafter, these two vendees conveyed the properties purchased by them to the plaintiff under two sale deeds, dated 31st December, 1945. On 5th April, 1946, the defendant filed E.P. No. 94 of 1946 for transmission of the decree obtained by him in C.S. No. 166 of 1934 to the Sub-Court of Chingleput through the District Court for execution. It appears that in the application for transmission it was stated that the defendant intended to execute the decree against the purchase price in respect of the suit properties in the hands of the purchasers. The execution petition actually filed on 6th November, 1946, in the Court of the Subordinate Judge of Chingleput, however, was for attachment of the suit properties. The defendant added as parties to this execution petition the legal representative of the orginal judgment-debtor, Venkatasubba Rao and Paramasiva Mudali, the legal representative of Murugesa. The relief prayed was that the Court may be pleased to order attachment of the properties and to sell them. On this application an order for attachment was made on 23rd November, 1946. In pursuance of this order attachment was effected on 26th January, 1947, by beat of tom-tom and by affixture of a copy of the order of attachment on the wall of a temple situated in one of the villages, and of another copy to a tree in the other village. Thereupon the plaintiff filed an application under Order 21, rule 58 of the Code of Civil Procedure (E.A. 130 of 1947) praying that the attachment may be raised because the properties belonged to her and did not belong to the judgment-debtor. The defendant opposed the application on the ground that the sales under which the plaintiff claimed were intended really for the benefit of the judgment debtor who it was alleged was in possession of the properties. The application was allowed eventually by the learned Subordinate Judge by his order dated 19th November, 1947. The defendant did not choose to have this set aside by a suit as provided in Order 21, rule 63, [Civil Procedure Code. On 19th March, 1948, the plaintiff brought the suit out of which this appeal arises,claiming the sum of Rs. 10,300 as damages for the unlawful attachment of her properties procured by the defendant. The defendant denied his liability to the plaintiff to pay any damages. The defendant stated that he was not aware of the sale of the villages in favour of the plaintiff and he attached them *bona fide* and had every reasonable and probable cause to attach them and that the plaintiff was only a benamidar for the judgment-debtor.

Krishnaswami Nayudu, J., who tried the suit dismissed it. The learned Judge found that the defendant was bound by the judgment of this Court in A.S. No. 289 of 1944 in which it had been held that the suit properties were not liable to attachment in the hands of Murugesa Mudaliar and *prima facie* it should be held that the attachment was not legal and proper. But he also found that the defendant cannot be said to have acted without reasonable or probable cause; nor could it be said that he was actuated by malice,and that in his opinion the attachment was made by the defendant in the honest belief that he was making use of the process of Court in order to recover the moneys due to him. Though the attachment was wrongful it was only technically so. In the result the learned Judge dismissed the suit. The Plaintiff has filed the above appeal but has restricted her claim to Rs. 2.000. Learned counsel for the plaintiff-appellant contended that once the learned trial Judge had found that the attachment was not lawful, the plaintiff would be entitled to damages. Before this contention can be dealt with, it is necessary to discuss the basis of the plaintiff's action. The claim obviously arises in tort. In our opinion the claim can fall under one of two heads, namely—(1) trespass and (2) abuse of civil processs. No direct authority has been cited by counsel for either party bearing on this case. The following observations of Varadachariar, J. in *Srinivasayya* v. *Lakshmayya*[1], were brought to our notice by learned counsel for the respondent.

> " According to the principle laid down in *Kissorimohun Roy* v. *Harsukh Das*[2], no finding of malice or want of reasonable care is necessary in case where the property of a person who is not a party to the suit is wrongly attached. In such cases, the action is really one founded on trespass and not on special damage............Mr. Somayya however contended that in all the reported cases where damages for wrongful attachment have been awarded on the footing of trespass, the complaint had been made with reference to the attachment of movable property which was taken away from the custody of the real owner in consequence of the attachment. He argued that such deprivation of goods must necessarily have caused damage in that class of cases, but that in the case of attachment of immovable property there can be nothing similar to it. Under the law, the attachment of immovable property merely operates as a prohibition of alienation by the person against whom the order is made and who is supposed to be its owner; there is nothing in the attachment to fetter the rights of the real owner, if he is not the defendant or party sought to be proceeded against. At best, there might be a cloud cast upon his title, which must be remedied by proceedings under Order 21, rule 58, Civil Procedure Code, but it cannot be said that an attachment of immovable property involves anything in the nature of trespass or necessarily causes damages to the real owner. It cannot be denied that there is some force in this distinction insisted on by Mr. Somayya. Mr. Krishnaswami Aiyangar the learned Counsel for the respondents, sought to answer this distinction by pointing out that even in the case of attachment of immovable property, the amin has necessarily to go upon the property, to affix the notice of attachment thereon as required by law and that this would amount to a tresspass. He invited our attention to the very wide definition of the term 'trespass' in the authorities and contended that if trespass in law is established, the presence or absence of damage is immaterial. We do not propose to express any final opinion upon the maintainability " or otherwise of this distinction where an attachment takes place at the instance of a decree-holder, or upon the question whether, if all that the real owner can complain of consisted in the entry of the amin on the property to affix the notice, the principle of *de minimis non curat lex* will avail the defendant, to save him from liability for damages ".

The learned Judge found it unnecessary to decide the question as the attachment in the case before him was made under Order 16, rule 10, Civil Procedure Code. Though the above observations are obiter and do not decide the liability for damages, the learned Judge was apparently of the opinion that when the property of a person not a party to the suit is wrongly attached, the action is really one founded on trespass.

But there is another aspect of the matter: when the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for abuse of process. The law is thus summed up by Mr. Ramaswamy Ayyar in hs book on Torts, 4th Edition :

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[1] (1938) 1 M.L.J. 73 : I.L.R. (1938) Mad. 180.

[2] (1889) L.R. 17 I.A 17 : I.L.R. 17 Cal. 436 (P.C.).

"An arrest or attachment in execution before judgment is an act of the Court and therefore if a person procures it improperly against another he can be sued only in that form of action. If, however, the act complained of is not authorised by the order or warrant of the Court, then the party who procures it can be sued for trespass without proof of damage or malice, *e.g.*, seizure of property not specified in the warrant of attachment".

There are substantial points of distinction between an action for abuse of civil process and an action for trespass to property. In the former, which resembles an action for malicious prosecution, the plaintiff has to prove absence of reasonable and probable cause. But in an action for trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In an action for abuse of process the plaintiff has further to prove malice on the part of the defendant; but in an action for trespass this is not necessary.

In this case we do not think it necessary to decide finally the nature of the plaintiff's claim because we are convinced—and in this we are in agreement with the learned Judge—that the defendant had a reasonable excuse for attaching the properties in the hands of the plaintiff. We have come to this conclusion in the following circumstances. The plaintiff is a close relation of the judgment-debtor and presumably interested in him and his family. The original transfer by the judgmnet-debtor to his relation Venkatasubba Rao was found by both the Subordinae Judge as well as by this Court to be a sham transaction intended to screen the properties from creditors. Though Murugesa Mudaliar was held to be a *bona fide* purchaser, when the properties were again acquired by the plaintiff, it was reasonable on the part of the defendant to think that it was for the benefit of the judgment-debtor's family. The two vendees under the sale-deeds of 27th October, 1945, were employees of the plaintiff's family and two months after their purchase the properties were again conveyed to the plaintiff. The defendant might have honestly believed that the properties were finally purchased by the plaintiff for the judgment-debtor's family and therefore they were liable to be attached in execution of his decree. Whether the action is treated as one for trespass or as one for abuse of civil process, the defendant has established a good plea in defence. We agree with the learned Judge that the suit should be dismissed. The appeal is dismissed but we make no order as to costs because the attachment was technically wrong.

The memorandum of cross-objections is also dismissed. No costs.

R.M. *Appeal and cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALA AYYANGAR.

S. Vadivel Pillai .. *Petitioner**

v.

Pikasinidas Ammal and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXIV of 1949), *section* 2 (3)—*'Landlord'—Meaning of—Subsequent lessee who has not been put in possession—If entitled to maintain petition for eviction of previous tenant who is holding over.*

In order to maintain a petition for eviction against a tenant under the Madras Buildings (Lease and Rent Control) Act a person must either be receiving the rent or entitled to receive the rent.

Where after determining a lease in favour of *A* by notice the lessors let out the premises to another *X* for a term of five years, the period to commence from the date on which the keys were handed over to *X* who should pay a monthly rent during the period. *X* not being bound to pay rent until possession was delivered to her, would not be entitled to receive rent from the tenant holding over. Accordingly *X* is not a "landlord" within the meaning of section 2 (3) of the Rent Control Act entitled to maintain a petition for eviction of *A* the tenant holding over.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the order of the District Court of Madurai, dated 31st January, 1956 and made in Civil Revision Petition No. 4 of 1956 (C.M.A. No. 56 of 1955 on the file of the (Principal) Subordinate Judge of Madurai) (M.B.P. No. 391 of 1954 on the file of the Rent Controller, Madurai).

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* C.R.P. No. 227 of 1956. 3rd July, 1956.

O. K. Ramalingam, for Petitioner.

K. S. Ramamurthi and *T. R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT.—This Revision Petition, which is directed against an order of the learned District Judge of Madurai, in a revision to him under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, raises for consideration an interesting question on the construction of that enactment.

The petitioner was a tenant under two individuals originally impleaded as respondents 3 and 4 before the Rent Controller, but who have since been dropped out of the proceedings. There was a registered lease-deed determining the terms of the tenancy and the duration of the lease was a period of 6½ years commencing from 16th November, 1944. There were disputes between the owners of the property and the petitioner. The petitioner had effected certain repairs to the premises and was claiming large amounts as due to him on that account, as also for the payment of certain sums for municipal taxes and towards the discharge of debts owed by the owners of the property to third parties. These disputes appear to have been settled and it was the case of the first respondent (whose identity I shall set out in an instant) that under this settlement the tenant, the petitioner herein, was to be paid a sum of Rs. 2,300 in full quit of his claims and that he should vacate and surrender possession of the premises to the owners. These owners in their turn entered into an arrangement with the first respondent under which a sum of Rs. 3,000 was advanced to these owners, Rs. 2,300 for the payment of the amount due to the petitioner, and Rs. 700 to be paid to the owners for their family needs. Accordingly, on the 18th January, 1954, a house rent agreement, which has been marked as Exhibit A-1 in the case, was executed between the first respondent and the owners. The principal stipulations of this agreement were that the suit premises were to be let out to the first respondent for a term of five years, the period to commence from the date on which the keys were handed over to her, and that she should pay a monthly rental of Rs. 75 during this period. The agreement also referred to the advance of Rs. 3,000 and made provision for its repayment. Further to this agreement there was executed an indenture between the parties, dated 2nd February, 1954, entitled a rent deed and also referred to as an agreement was marked as Exhibit A-3 in the case, embodying the terms of a lease for five years. Armed with these documents, the first respondent filed an application for the eviction of the petitioner from the suit premises before the Additional Rent Controller, Madurai (M.B.P. 391 of 1954). The grounds of eviction were various and included wilful default in the payment of rent, sub-letting without the consent of the landlord, and use, of the premises, which had been let as a residential building, for non-residential purposes. All these grounds were controverted by the petitioner by the statement of objections filed on his behalf. But the principal objection raised by him related to the *locus standi* of the first respondent to maintain the application for eviction. He contended that this respondent was not a 'landlord' within the definition of that term in the Madras Buildings (Lease and Rent Control) Act, 1949, and was, therefore, not competent to file the application.

The Additional Rent Controller, who tried this petition in the first instance, held against the petitioner on all the grounds, repelled the preliminary objection to the maintainability of the petition and directed eviction of the petitioner.

The petitioner took the matter in appeal to the learned Subordinate Judge of Madurai who was the appellate authority under the statute. This learned Judge concurred in rejecting the preliminary objection and affirmed two of the grounds for eviction put forward on behalf of the first respondent, *viz.*, *bona fide* requirement for personal occupation and sub-letting without the consent of the landlord. He, therefore, affirmed the order of the Rent Controller.

The petitioner filed a revision to the learned District Judge. The findings on the grounds of eviction were not canvassed and the only point argued at that state was as regards the maintainability of the petition by the first respondent. The learned District Judge dismissed the revision holding that the first respondent had an interest in the property by reason of the lease in her favour embodied in Exhibit A-3 and therefore decided against the petitioner. Hence this revision.

The sole question, therefore, for consideration in this Revision Petition is whether the first respondent in a landlord within the definition of section 2 (3) of the Act who could maintain an application for eviction under section 7.

The petitioner, it is not disputed, is a tenant in possession of a building. Section 7 of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949) enacts :

> "7. (1) A tenant in possession of a building shall not be evicted therefrom whether in execution of a decree or otherwise and whether before or after the termination of the tenancy except in accordance with the provisions of this section".

The other relevant provisions of section 7 which enact *inter alia* the person on whose application the tenant may be evicted and the grounds upon which the same may be ordered, are set out in section 7 (2) and section 7 (3) of the Act. In both of these, it is the landlord who is given the right to evict the tenant on the grounds mentioned there. These sub-sections make it clear that a person has to be a 'landlord' within the meaning of this section before an application by him for eviction could be entertained. We have, therefore, to ascertain the meaning of the expression 'landlord' which is defined in section 2 (3) of the Act thus :

> " 'Landlord' includes the person who is receiving or is entitled to receive the rent of a building whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant."

Analysing this provision the expression 'landlord' would include four classes of persons :

(1) a person who is receiving the rent of a building on his own account or on behalf of others;

(2) a person who is entitled to receive rent on his own account or on behalf of others;

(3) a person who would receive the rent if the building were let to a tenant; and

(4) a person who would be entitled to receive the rent if the building were let to a tenant.

I am unable to see any distinction between the last two categories and will, therefore, treat them as really one. In the present case the persons who were receiving the rent on their own account on the date of the application before the Rent Controller were undoubtedly the owners who were impleaded as respondents 3 and 4 in the petition before the Rent Controller and the present first respondent was not receiving the rent. As the building had been let to a tenant classes 3 and 4 are excluded and we are, therefore, left with class (2), *i.e.*, a person who is entitled to receive the rent of a building on his own account or on behalf of others. It is not anybody's case that the first respondent was claiming to receive the rent on behalf of others. Therefore, the only question is whether she is a person 'who is entitled to receive the rent of the building on her own account'.

Though the lease in favour of the petitioner under the registered deed, dated 16th November, 1944, had expired, he was a statutory tenant and entitled to remain in possession of the property until he was duly evicted in accordance with the provisions of section 7. It was during the currency of this statutory term that the owner entered into the arrangement with the first respondent under Exhibits A-1 and A-3. Of course there is nothing to prevent a lessor dealing with the reversion after the creation of a lease and during its currency. Section 109 of the Transfer of Property Act makes this clear and thus enacts :

> "109. If the lessor transfers the property leased or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless, he elects to treat the transferee as the person liable to him".

By reason of this, a concurrent lease might be executed by the landlord. If the two deeds Exhibits A-1 and A-3 particularly Exhibit A-3 created a present demise in favour of the first respondent—a demise under which her term commenced before the application for eviction there could be no doubt that she would have all the rights of a landlord under section 109 of the Transfer of Property Act and would be entitled, *inter alia*, to evict the petitioner. The question, however, is whether the first respondent is a lessee whose term had commenced.

In approaching the question in this manner I have not ignored the fact that the doctrine of *interesse termine* is not part of the law of India under the Transfer of Property Act but I might here note that this doctrine has been abolished even in England by section 149 of the Law of Property Act, 1925. But even there section 149 (2) provides in terms that a lease operates from the date fixed for the commencement of the term without actual entry, so that before the date of the commencement of the term the right of the lessee is merely *in personam* against the lessor.

Apart, however, from this, the only question now relevant is whether the first respondent is a person entitled to receive the rent of the building on the date of the application for eviction.

The learned District Judge considered that the decisions of the Court reported in *Manikkam Pillai* v. *Rathnaswami Nadar*[1], and *Bhogilal* v. *Subramania Aiyar*[2], concluded the point against the petitioner. Before adverting to these decisions, it may be useful to refer to the recitals in the two deeds upon which reliance has been placed by the learned District Judge and which were also relied on before me by the learned counsel for the first respondent. Under section 105 of the Transfer of Property Act, a lease is a transfer of a right to enjoy immoveable property made for a certain time, express or implied. As the lease purports to be for a term of five years, it is clear that the time of the commencement of the lease is a matter of vital importance. The recital in Exhibit A-1 as regards this matter is to be found in the second paragraph reading thus:

> "Whereas it has been agreed that party No. 1 (the first respondent) should occupy the undermentioned house belonging to party No. 2 (the lessors, the original respondents 3 and 4) and in their enjoyment being let out for rent for five years, from the date on which the party No. 2 handed over the key and the party No. 1 into possession thereof for a monthly rent of Rs. 75."

The agreement further provided that a formal registered rent deed would be executed and registered within fifteen days from that date. It was in pursuance of this last stipulation that Exhibit A-3 came in to being. This is dated, 2nd February, 1954 and as regards the commencement of the lease and its duration its terms are nearly identical with those in Exhibit A-1, namely, the duration is five years from such date within three months from 18th January, 1954, on which party No. 2 puts party No. 1 in possession thereof. It is, therefore, clear from these that the term of five years provided under the lease does not commence until possession is delivered to the lessee. Nor is there any provision in the document itself to indicate that the lessee is to have any interest in the premises before such possession was delivered apart from any rights—she might have against her lessor—which is irrelevant in the present context.

These being the terms of the documents I shall now turn to the two decisions on the basis of which the learned District Judge has held that the lessee has an interest in the property even prior to the delivery of possession. *Manikkam Pillai* v. *Rathnaswami Nadar*[1], dealt with a case where there had been a lease for ten years but this being invalid was treated as a monthly tenancy. During the subsistence of this tenancy a lease for twenty years was granted in favour of the plaintiff and the question which was debated before the Court was whether a notice to quit issued by the second (concurrent) lessee was valid. A Bench of this Court consisting of Spencer and Krishnan, JJ., held that a concurrent lessee was a transferee of a part of the reversionary interest of the lessor who had under section 109 all the rights of the lessor as to the property transferred. But it will be noticed that the lease for twenty years in favour of the second tenant had commenced and it was during the subsistence of that lease that he issued the notice to quit. That decision, therefore, does not assist the first respondent in the present case whose term did not commence on the date of her application for eviction. The other decision referred to is one by Ramaswami, J., reported in *Bhogilal* v. *Subramania Aiyer*[1]. There, as in *Manikkam Pillai* v. *Rathnaswami Nadar*[2], the second lease had taken effect and the term of twenty five years in favour of this lessee had commenced to run. It was by reason of this circumstance that the learned Judge said :

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[1] (1917) 33 M.L.J. 684.

> "After the execution of the lease, the managers trustee had no right to collect rents from any tenant who may be occupying portions of the premises. That right has devolved upon the petitioner."

In contrast with this, in the present case, the obligation of the first respondent to pay rent to her lessor, would commence only from the date on which possession was delivered to her. Till that time arrived, she would not be liable for rent and consequently the original owners of the property would be entitled to the rents from the petitioner.

The matter may be looked at from another aspect, *viz*., from the point of view of the transferors. It is obvious that there could not be two persons having concurrent rights to receive the rent from a tenant in possession each in his own right apart from joint owners. If the transferors, *viz*., the original owners of the property, had a right to receive the rent on the date of the application for eviction, it is clear that the lessee, the first respondent here, could have no such right. On the terms of Exhibit A-3 it would not be possible to urge that on the execution of that document the lessors deprived themselves of the right to receive the rent from the petitioner. Their right in that regard would cease only when they put the first respondent in possession and only from that date would the term of five years commence and along with that the obligation to pay the stipulated rent. Until that time arrived "the person entitled to receive the rent" as that expression is used in section 2 (3) of the Act would be the original owners of the property. If so, it necessarily excludes the right of the first respondent to receive the rent from the property.

In these circumstances, the question then is whether it can be said that the first respondent is a person who is receiving or is entitled to receive the rent of the building. As mentioned already he is certainly not receiving the rent because there has been no attornment or agreement between hereself and the tenant in that regard. Is he then a person entitled to receive the rent? Under the terms of the documents, the material portion of which I have set out earlier, she is entitled to receive the rent only from the date on which possession is delivered to her. Until that date she is not bound to pay rent and necessarily, therefore, would not be entitled to receive rent. In this view it appears to me to be clear that the first respondent is not a 'landlord' who is entitled to maintain the petition for eviction of the petitioner.

The Civil Revision Petition succeeds and the order for eviction passed by the Courts below is set aside and the rent control application is dismissed. Having regard, however, to the fact that the petitioner, who originally appears to have promised to vacate the premises, went back on his word, I do not consider this a prope case to make any order as to costs in this Civil Revision Petition.

K.S. *Petition allowed.*

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1. (1953) 2 M.L.J. 625: A.I.R. 1954 Mad. 514. 2. (1917) 33 M.L.J. 684.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Testamantary Civil Jurisdiction.]

PRESENT :—MR. JUSTICE RAMASWAMI.

Minor Padmavathi Ammal by next friend and guardian V.K. Venkatachala Pillai .. *Plaintiff**

v.

Gajendravalli Ammal .. *Defendant.*

Provident Funds Act (XIX of 1925), section 5-A—Construction—" Shall vest "—Meaning of —Right of nominee under—If subject to or defeasible by subsequent testamentary disposition by subscriber or his personal law—Will—Construction—Bequest of amount deposited in Postal Savings Bank—Legatee's right to entire amount of principal and interest.

Where a person has nominated a person as the person entitled to receive the amount lying to his credit in a Provident Fund after his death, and that nomination is subsisting, it cannot be altered by will and the nominee is entitled to receive the amount after the subscriber's death absolutely. Such sum does not form part of the estate of the deceased subscriber ; nor can it be disposed of by the subscriber by will. The nomination operates as a will and cannot be controlled by the personal law to which the subscriber was subject.

The expression " shall vest " in section 5 (1) of the Provident Funds Act, means that the amount standing to the credit of the subscriber vests in the nominee absolutely, free from any claim from the other heirs of the deceased subscriber and cannot be interpreted as meaning that the fund vests as the property of a dependent, though he may be a dependent, and subject to the testamentary disposition of the subscriber or his personal law in case of intestacy.

Mt. Amna Khatoon v. *Abdul Karim*, A.I.R. 1937 All. 562; *Hayatuddin* v. *Mt. Rahiman*, A.I.R. 1935, Sind 73 and *Noor Mahamed* v. *Sardar Khatun*, A.I.R. 1949 Sind 38, dissented from.

Hindley v. *Joynarain Marwari*, (1919) I.L.R. 46 Cal. 962; *Thaj Mahomed Sahib* v. *Balaji Singh*, (1933) 66 M.L.J. 207 : I.L.R. 57 Mad. 440; *Sitaramaswami Patnaick* v. *Venkatarama Rao*, (1944) 1 M.L.J. 198; *The Secretary of State for India in Council* v. *Mrs. Mary Murray*, (1929) 33 C.W.N. 1148; *Ahmad Abdul Razak* v. *Jamala Bint Mahdi*, A.I.R. 1935 Bom. 234 and *Mt. Hurmat Bi* v. *Kal Banu*, A.I.R. 1932 Sind 115, followed.

Case-law discussed.

A testator in his last will and testament left a legacy *inter alia* to his grand-daughter *P* in the following terms :

" It is my desire and intention that the—amount of Rs. 2,650 which is deposited in the Postal Savings Bank in my name should be given to my grand-daughter, the said *P*. The amount after it is withdrawn should be deposited in *M* Bank in her name. The interest that is payable on the amount should be spent for necessaries and education of the same should be spent by.... She is to enjoy the amount absolutely after she attains her majority ".

The legatee claimed the amount and interest accrued due thereon but her claim was opposed by another heir of the deceased who contended that the legatee was entitled only to the sum of Rs. 2,650 and not the interests accrued due thereon.

Held : negativing the contention, that what the testator bequeathed to *P* was his Postal Savings Account and not the specific sum of Rs. 2,650 and the legatee was entitled to the entire amount of principal and interest due under the account in the name of the deceased.

Originating summons taken out in regard to the Will of Manoharam Pillai.

T. S. Santhanam, for Plaintiff.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is an Originating Summons taken out in regard to the interpretation of the Will of Manoharam Pillai.

The facts are.—Manoharam Pillai who died in Kadiri, Anantapur District on 10th February, 1946, was survived by his second daughter Gajendravalli Ammal and a grand-daughter minor Padmavathi Ammal, the plaintiff herein, by his predeceased daughter Sarasvathi Bai. The deceased had fallen out with his younger brother Dr. Thillainayagam Pillai and has cut him off from his Will and has explicitly stated so therein. This Thillainayagam Pillai seems to have become the guide, Philosopher and friend of this Gajendravalli Ammal and her power of attorney agent.

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* C. S. No. 319 of 1954. 4th January, 1955.

In the last will and testament made by this Manoharam Pillai on 11th January, 1941, he left two legacies to his grand-daughter by Padmavathi. The relevent passage is as follows :

> "It is my desire and intention that the amount of Rs. 2,350 which I have to get as Mutual Retirement Benefit Fund from M.S.M. Railway Ltd., and the amount of Rs. 2,650 which is deposited in Postal Savings Bank in my name should be given to my grand-daughter the said Padmavathi Ammal, my deceased daughter's daughter. The amounts after they are withdrawn should be deposited in Mysore Bank at Bangalore in her name. The interest that is payable on these amounts should be spent for her necessaries and eduction and the same should be spent by my deceased daughter's husband V. K. Venkatachalam Pillai. She is to enjoy these amounts absolutely after she attains her majority."

Therefore, the two legacies that become payable to the plaintiff are (*a*) the moneys due from the Mutual Retirement Benefit Fund from M.S.M. Railway ; and (*b*) the amount due from the Postal Savings Bank at Kadiri standing in the name of the deceased. Gajendravalli Ammal the aunt is contending that Padmavathi is entitled only to the sum of Rs. 2,650 and not the interest accrued due thereon and secondly, that in respect of the sum due from the Mutual Retirement Benefit Fund from M.S.M. Raliway, the deceased Manoharam Pillai having nominated Gajendravalli as the beneficiary and that nomination being subsisting Manoharam cannot dispose of the same by Will and the plaintiff is not entitled therefore to that bequest. The subsisting nominee in the Government Books at the time of the death of Manoharam Pillai was undoubtedly Gajendravalli. Hence this Originating Summons for interpretation of the Will on these two points.

Point 1.—What Manoharam Pillai bequeathed to Padmavathi was his Postal Savings Bank account and not the specific sum of Rs. 2,650. The language used is explicit and admits of no gross whatsoever. Therefore, this Padmavathi is entitled to the Postal Savings Bank account, *viz.*, the entire amount of principal and interest accrued due under that account in the name of the deceased. This point is clarified accordingly and Padmavathi is found entitled to the entire Savings Bank account, *viz.*, the sum of Rs. 2,650 *plus* the interest accrued due.

Point 2.—Turning to the 2nd point, the question resolves itself into an interpretation of section 5 of the Provident Fund Act, 1926.

There are two schools of judicial opinion which hold that the right to receive the amount deposited in the Provident Fund by the nominated person is nothing more nor less than to receive the amount and that the right to receive this sum is subject to the testamentary disposition of the subscriber or if he died interstate the personal law of that subscriber ; *per contra* that where the deceased has nominated a person to whom a certain sum lying to his credit in the Provident Fund is to be paid after his death, such sum does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will and that the nomination conferred an absolute right on the nominees to appropriate for themselves the amount of the Provident Fund and that the nomination operated as a will and was not controlled by the provisions of the personal law to which the subscriber was subject.

The first school of judicial opinion is embodied in *Hayatuddin* v. *Mt. Rahiman*[1]; *Mt. Amna Khatoon* v. *Abdul Karim*[2], and *Noor Mahomed* v. *Sardar Khatun*[3].

In *Hayatuddin* v. *Mt. Rahiman*[1], it was held as follows :

> "Under the Sunni Law a bequest by a testator in favour of one of his heirs is not valid, unless it is consented to by the other heirs after his death, and under the Shia Law, a bequest by a testator in favour of one of his heirs in excess of one-third of the estate of the testator is invalid unless it is likewise assented to by the other heirs after his death.
>
> The Provident Funds Act is not intended to affect the rights of the dependants of the subscriber or depositor to share the fund *inter se* in accordance with the personal law of the deceased, except to the extent expressly mentioned in S. 3, Cl. (2) of the Act, that is to say, to protect the fund from assignment by the subscriber and from attachment by creditors who have advanced money to him or

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[1] A.I.R. 1935 Sind 73.

[2] A.I.R. 1937 All. 562.

[3] A.I.R. 1949 Sind 38.

to his dependants during his lifetime. Hence where the subscriber is a Mahomedan, a nominee of his, though as such has an absolute right to receive the money does not thereby become the absolute owner thereof. Thus, it is rather unfortunate that a Mahomedan should not be able to give directions that the fund should after his death be distributed amongst his dependants in a manner inconsistent with the Mahomedan Law of intestate succession, although a non-Mahomedan may do so by signing a nomination paper made out in a form which amounts to a valid will according to the personal law applicable to him. But this is a point for the Legislature to consider.

It must always be presumed that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by necessary implication or in other words beyond the immediate scope and object of the statute. In all general matters beyond the law remains undisturbed." *Amiaj Shewakshaw* v. *Awaki Dhany Shah*[1], followed and *Hindley* v. *Joynarain*[2], Ref. to.

In *Mt. Amna Khatoon* v. *Abdul Karim*[3], Sulaiman, C.J., stated.

"It accordingly follows that section 5 refers merely to the persons who are nominated to receive the provident fund from the authority in question and the right to receive such fund on the death of subscriber is absolute and cannot be questioned by such authority. But this nomination is itself subject to any disposition, testamentary or otherwise, which might have been made by the subscriber. It follows accordingly that the mere fact that a certain person has been declared to be the nominee under section 5 for the purpose of receiving the provident fund is not necessarily the sole person entitled to appropriate the amount as the owner, legatee or heir. The question of the distribution of the amount after it has been drawn by the nominee as among those who may be entitled to it either under the personal law or by the testamentary disposition is not covered by this section."

He also stated:

"The mother was, therefore, a person who was authorised under the rules to receive payment being a dependant of the deceased. It follows that under section 3 (2) the amount vested in her absolutely free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor, because the sum was payable under the rules of the fund to this dependant of the depositor." [*Amiaj* v. *Awaki*[1]; *Hardial* v. *Janaki*[4]; *Harmat Bibi* v. *Kaji Banu*[5], Followed] In *Noor Mohomed* v. *Sardar Khatum*[6], it was held as follows:

"In every case the right conferred by the Act upon the nominee, whether the nominee be a dependant or not, is the 'right to receive' the amount deposited in the Provident Fund by the subscriber, nothing more and nothing less, although it is enacted that the nomination shall be deemed to confer such right absolutely, notwithstanding anything contained in any law or any disposition made by the subscriber. The use of the word 'absolutely' has the effect of conferring on the nominee a title to the exclusive ownership of the deposit. The words 'notwithstanding anything contained in any law for the time being in force or any disposition whether testamentary or otherwise' constitute a protective provision, having the effect of protecting the specified right conferred, *viz.*, the right to receiving the sum, and of making it indefeasible by enacting that no one else shall be in a position to challenge the right of the nominee to receive the sum, even though he may be able to show that he had a better or superior title to the sum under the law or by reason of a disposition made by the subscriber. But the right to receive is subject to the rights of others under the law or arising out of any disposition made by the subscriber. Where a nomination has once been duly made the Act is not concerned with the question who is ultimately entitled to the sum, but only designates the person to whom the payment has to be made. As to who is entitled to the sum which the nominee receives, one has to take into consideration not only the Provident Fund Act but also other relevant law applicable to the case. 'Right to receive' is not equivalent to right to receive beneficially: *Shewaksha* v. *Awaki Dhany*[1]; *Hayatuddin* v. *Mt. Rahiman*[7]; *Mt. Latifambai* v. *Mt. Sakinabai*[8]; followed; *Hindley* v. *Joynarain*[2]; *Haridial* v. *Janki*[4]; *Mt. Amna Khatoon* v. *Ahdul Karim*[3]; Relied on; *Harmat Bibi* v. *Kaz Banu*[5]; *Thaj Mahomed* v. *Balaji Singh*[9]; *Ahmed Abdul Razaak* v. *Jamala Bint Mehdi*[10]; *M. Nain* v. *Mt. Nunimuanissa*[11]; Dissented; *In the goods of Stanley Martin*[12]; *Kashab Lal* v. *Ivarani Rudra*[13]; reffered.

Vesting in relation to property means the acquisition of the legal right of immediate possession and dominion over property. It means nothing more. The words 'the sum shall vest in the nominee' do not connote anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from the trustees of the fund to the nominee, and do not mean that the full rights of ownership, including the right to the beneficial enjoyment of the property, shall pass to the nominee. The nominee becomes entitled to possession of the sum without having to obtain letters of administration or a succession certificate. A property may vest in

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1. A.I.R. 1924 Sind 57.
2. A.I.R. 1920 Cal. 305.
3. A.I.R. 1937 All. 562.
4. A.I.R. 1928 Lah. 773.
5. A.I.R. 1932 Sind 115.
6. A.I.R. 1949 Sind 38.
7. A.I.R. 1935 Sind 73.
8. A.I.R. 1939 Sind 107.
9. (1933) 66 M.L.J. 207 : I.L.R. 57 Mad. 440.
10. A.I.R. 1935 Bom. 234.
11. A.I.R. 1936 Oudh 32 (F.B.).
12. A.I.R. 1939 Cal. 642.
13. A.I.R. 1947 Cal. 176.

one person, and the beneficial right of enjoying the property as an owner may at the same time vest in another person. The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is therefore quite clear. It confers on the nominee the immediate right to possession and dominion over the amount, without in any manner affecting the beneficial rights of the actual owners, whoever they may be, either as heirs or legatees. Of course, if the dependant nominee happens to be the only heir or legatee, and is therefore also entitled to the beneficial right in the sum, the entire rights of ownership would vest in him. When this is the case, the dependant's rights are conferred on him not only by the Provident Funds Act, but by the entire law applicable to the case. The words 'sha l vest' cannot be construed as 'shall vest as the property of the dependant'."

We shall now turn to the cases including those of our own High Court in which a contrary view has been expressed.

In *Mt. Hurmat Bibi* v. *Mt. Kaz Banu*[1], Aston, A.J.C. held :

> "The provisions of the Act relating to the right of nominees to receive the provident fund are, not to be read, as though they were controlled by, or subject to any other law for the time being in force or subject to any disposition whether testamentary or otherwise, by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. The fact that letters of administration or probate is granted to a different person does not prevent the nominee from claiming under the Act the full amount of the sum due on the death of a subscriber to the fund."

In *Thaj Mahamed Sahib* v. *Balaji Singh*[2], decided by Sundaram Chetti and Pakenham Walsh, JJ., it was held :

> " A Provident Fund amount, which stood to the credit of a deceased Hindu at the time of his death and which was paid over to his son, as a dependant, under section 4 (1) (*a*) of the Provident Fund Act (XIX of 1925) cannot be regarded as the assets of the deceased in the hands of his son, and is not liable to be proceeded against for the realisation of a decree debt due by the deceased. Section 3 (2) of the Act vested the fund in the son, and consequently it became the property of the son."

The other Madras decisions on the same lines are : *Dharma Rao* v. *Venkata Mahalakshmamma*[3], wherein it was held that where a valid nomination is subsisting a subscriber cannot by will deprive the nominee of the money in the event of his death before retirement and *Subramania Somayajulu* v. *Lakshmi Soma Devi*[4], *Sitaramaswami Patnaick* v. *Venkatatrama Rao*[5] *M. Monsingh* v. *Moti Bai*[6].

The learned Judges who decided *Thaj Mahomed Sahib* v. *Balaji Singh*[7], have referred to the elaborate discussion as to the scheme of the Act in the judgment of Rankin, J., reported as *Hindley* v. *Joynarain Marwari*[8], wherein in respect of section 4 (1) the learned Judge has observed thus at p. 969 :

> " It ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate."

The Bench of this Court expressed entire agreement with that view and also with the opinion expressed by a Division Bench of the Calcutta High Court in *The Secretary of State for India in Council* v. *Mrs. Mary Murray*[9], wherein the learned Judges stated that the widow was not bound to apply for letters of Administration to recover the Provident Fund amount as the money belonged to her on account of the statute providing that it would vest in her. The Bench of this Court expressed agreement with that decision also.

In *Ahmad Abdul Razaak* v. *Jamala Bint Medhi*[10], it was held that the amount standing to the credit of the subscriber vests in the dependant and where the dependant is nominated by the subscriber as the person entitled to receive the fund on his death it vests in him absolutely free from any claim from the other heirs of the deceased subscriber. *Makyway* v. *Mi Kay*[11], relied on.

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[1] A.I.R. 1932 Sind 115.

[2] (1933) 66 M.L.J. 207: I.L.R. 57 Mad. 440.

[3] (1946) 2 M.L.J. 248: I.L.R. (1947) Mad. 387.

[4] (1949) 2 M.L.J. 635.

[5] (1944) 1 M.L.J. 198.

[6] (1935) 1 M.L.J. 790: I.L.R. 59 Mad. 855.

[7] (1933) 66 M.L.J. 207: I.L.R. 57 Mad. 440.

[8] (1919) I.L.R. 46 Cal. 962.

[9] (1929) 33 C.W.N. 1148.

[10] A.I.R. 1935 Bom. 234.

[11] A.I.R. 1929 Rang. 54.

In *M. Naim* v. *Mt. Nunimunnissa*[1], the facts were: a Mohamedan employee of the Rohilkhand and Kumaon Railway, and a depositor in the Provident Fund maintained for the employees of the Railway, made a declaration in accordance with rule 16 of the Rules governing the said Fund by executing two forms. In one form he declared that in the event of his death, his son should be entitled to receive payment of half his deposit in the Provident Fund and also appointed *N* as his executor in respect of the deposit. The other form similarly declared his other son *M* to be entitled to receive half of his deposit in the Provident Fund. It was held by the Full Bench :

> "That the two forms must be regarded as wills expressing the intention of the declarant, that in the event of his death the nominees were to take the fund half and half each and in the absence of any words to the contrary, as giving a beneficial interest to the legatees in the Provident Fund.
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> The words 'notwithstanding anything contained in any law for the time being in force' in section 5 (1) have the effect of validating wills notwithstanding anything contained in the personal law of the depositor. The word 'absolutely' means that the recipient is to be deemed to be entitled to receive money free from any charge or attachment or liability enforceable by other heirs or by creditors. The nominee has the right to appropriate the deposit and not merely to realise it on behalf of the general body of heirs.
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> A nomination made by a depositor in the Railway Provident Fund, therefore, confers an absolute right on the nominee to appropriate to themselves the amount of the Provident Fund. The nomination operates as will, which is not controlled by the personal law of the testator.
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> That the nomination conferred an absolute right on the nominees to appropriate to themsevles the amount of the Provident Fund. That the nomination operated as a will and was not controlled by the provisions of Mahomedan Law. *Ma Kyway* v. *Ma Mi Kay*[2], ; *Piare Lal* v. *Pampat*[3] ; *Mt. Hurmat Bi* v. *Kal Banu*[4]; *Thaj Sahib* v. *Balaji*[5], Relied on.
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> Per *Srivatsava, J.*—The Court has to interpret the provisions of a statute according to their plain meaning to administer the law as it has been enacted by the Legislature. It is not necessary for it to speculate as regards the reasons which influenced the Legislature in enacting the provisions of particular statute.
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> Per *King, C.J.*—*Quaere*: It is doubtful, whether section 3, sub-section (2) applies to a case where the nomination is duly made and is subsisting. In such a case the money is payable to the nominees as such and is not payable to them as dependants, although they may happen to be dependants."

In the Goods of Stanley Martin[6], it was held that where the deceased has nominated certain person to whom certain sum lying to his credit in the Railway Provident Fund is to be paid after his death, such sum does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will.

In *Keshab Lal* v. *Ivarani Rudra*[7], the facts were : *J* who was a subscriber of the Contributory Provident Fund (Bengal) had made a nomination in accordance with rule 5 of the Fund Rules whereby he appointed his wife as his sole nominee and conferred upon her the right to receive the amount which might stand at his credit in the fund in the event of his death. After this, *J* married a second wife and had two sons from the second wife. But no fresh nomination was made by him. After the death of *J* the sons claimed that they were entitled to three-fourths of the Provident Fund money standing to the credit of *J* while their step-mother was entitled to a life estate in a one-fourth share : It was held :

> "That as the nomination was still subsisting at the time of *J*'s death, under the rules the amount standing to his credit was payable to his first wife, the nominee and as, besides being the nominee, she was also the dependant of the subscriber *J*, the money vested in her absolutely in view of the clear language of section 3 Provident Funds Act. Even under section 5 of the Act she had an indefeasible right to demand immediate payment of the money standing to the credit of *J*. The sons of *J* were not therefore entitled to the money."

Nidhusudhan v. *Bibhabat*[8], discussed and dissented from. See also *Matadin* v. *Nathilal*[9], *Komalsing* v. *Krishnabai*[10] and *Piare Lal* v. *Ganpat*[11], decided on the same lines.

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[1] A.I.R. 1936 Oudh 32.

[2] A.I.R. 1929 Rang. 54.

[3] A.I.R. 1930 Lah. 437.

[4] A.I.R. 1932 Sind 115.

[5] (1953) 66 M.L.J. 207: I.L.R. 57 Mad. 440.

[6] A.I.R. 1939 Cal. 642.

[7] A.I.R. 1947 Cal. 176.

[8] A.I.R. 1940 Cal. 395.

[9] A.I.R. 1951 Ajmer 42.

[10] A.I.R. 1946 Bom. 304 at 306.

[11] A.I.R. 1930 Lah. 447.

Thus the decision of our own High Court and the weight of judicial decisions and the persuasiveness of the reasoning put forward in the latter class of decisions which is in conformity with the letter and spirit of the enactment and especially section 5 of the Act are all in favour of our holding that when the nomination is subsisting it cannot be altered by will and the nominee is entitled to receive that amount absolutely and that it would not form part of the undisposed estate of the deceased.

Therefore, Padmavathi in the case of the subsisting nomination in favour of Gajendravalli Ammal would not be entitled to receive the provident fund.

This originating summons is disposed of accordingly and in the circumstances, costs of Rs. 100 will come out of the estate of Manoharam Pillai.

P.R.N. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

M. A. Ethirajulu Naidu .. *Petitioner**

v.

T. K. C. K. Panikkar .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 37, *rule* 4—*Jurisdiction of the Court to set aside decree.*

The terms of order 37, rule 4, are of wide amptitude which place no restrictions on the power of the Court to set aside the decree and grant leave to defend the suit. The provisions of order 37, rule 3, and the period of limitation within which an application for leave to defend could be filed do not restrict the power of the Court under rule 4 to grant leave to defend when such an application has been preferred by a party who has entered appearance in pursuance of a notice under rule 2 but as against whom an *ex-parte* decree has been passed.

Shah Mohammad Khan v. *Woodfall*, 1955 2 M.L.J. 333 and *James Manickam* v. *Jayanarayan*, (1953) 1 M.L.J. 825 referred.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the City Civil Court, Madras, dated 22nd July, 1955 and made in I.A. No. 1102 of 1954 in O.S. No. 603 of 1954.

K. C. Jacob and *S. K. L. Ratan*, for Petitioner.

K. Venkataramani and *S. B. Mani*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order passed in I.A. No. 1102 of 1954 in O.S. No. 603 of 1954 on the file of the City Civil Court, Madras. O.S. No. 603 of 1954 was a suit filed under the summary procedure prescribed under Order 37 of the Code of Civil Procedure on foot of a promissory note executed by the defendant in favour of the plaintiff. When the defendant was served with notice of summons in the suit he instructed an advocate to appear on his behalf in order that he might obtain leave to defend the suit. The petition for leave to defend was not immediately filed notwithstanding the adjournment of the suit twice to enable this to be done. Thereupon the suit was decreed *ex parte*, on 20th September, 1954.

The next proceeding in the suit was an application by the defendants I.A. No. 1100 of 1954 for setting aside the *ex parte* decree along with an application I.A. No. 1102 of 1954 for the grant of leave to defend the suit. In the common affidavit in support of these petitions, the defendant stated that he was unable to appear in Court on 20th September, 1954 and file the application for leave to defend the suit because of his illness and an *ex parte* decree was passed on that date because of refusal of the Court to adjourn the suit to another date. On this ground he stated that he was prevented by unavoidable reasons from filing the petition for leave to defend the suit by 20th September, 1954. He then set out the details of his defence to the action and prayed for setting aside the *ex parte* decree and granting leave to defend the suit. Besides controverting the facts the legal objection raised to the grant of the prayers in I.A. No. 1102 of 1954 was that the application was barred under Article 159 of the Limitation Act. The learned City Civil Court Judge held that there was sufficient cause for the non-appearance of the defendant on 20th September, 1954 and set aside the *ex parte* decree by order, dated 2nd September, 1955. No revision is preferred against this ordert which has become final. The Court then proceeded to consider I.A. No. 1102 of 1954 and overruling the objection on the ground of limitation granted the defendant leave to defend the suit. The jurisdiction of the Court to make this order is challenged in this revision petition.

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*C.R.P. No. 1147 of 1955. 27th September, 1956.

Order 37, Civil Procedure Code provides for a summary procedure in suits on negotiable instruments by reason of which when a suit is filed under this chapter the facts stated in the plaint are deemed to have been admitted and the plaintiff is entitled to a decree on his pleading unless the defendant satisfies the Court that he has a tenable defence and the Court is pleased to grant him leave to defend the suit which it might do either unconditionally or subject to such reasonable conditions as it might deem fit to impose. This is provided for by Order 37, rule 2, the material portions of which are

> "2. (1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.
>
> (2) In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend ; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree"

and the sub-rule provides for the amount for which a decree might be passed. The procedure for leave to defend referred to in paragraph 2 of the sub-rule which I have extracted above is to be found in rule 3 which is in these terms :

> "3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.
>
> (2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

This is followed by rule 4 reading thus

> "4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do and on such terms as the Court thinks fit."

The time which a defendant, on whom summons is served as provided under Order 37, rule 2, paragraph 1, has to file an application for leave to appear and defend the suit is to be found in Article 159 of the Limitation Act which prescribes a limitation of 10 days commencing from the time when the summons is served. It might now be taken as settled that a Court has no power to extend the period of 10 days prescribed by Article 159 of the Limitation Act within which an application for leave to defend the suit under Order 37, Rule 3, could be filed into Court. Rajamannar, C.J., delivering the judgment of the Bench of this Court in *Shah Mohammad Khan* v. *Woodfall*[1], explained the position thus :

> "Under Order 37, rule 3 of the Code of Civil Procedure, the Court shall, upon application by the defendant, give leave to appear and defend the suit, after the defendant satisfies the Court by facts disclosed in affidavits that there is *prima facie* defence. Order 37, rule 2 (2) of the Code, provides that in any case in which the defendant has not obtained such leave, the allegations in the plaint shall be deemed to be admitted and that the plaintiff shall be entitled to a decree. We are not now concerned with the provision in rule 4 of Order 37 which empowers the Court in special circumstances to set aside the decree and then give leave to the defendant to appear and defend the suit. Article 159 of Schedule I of the Indian Limitation Act prescribes a period of ten days fom the time when the summons is served for an application for leave to appear and defend a suit under Order 37 of the Code of Civil Procedure. So an application filed after the prescribed period of ten days would be barred by limitation and will have to be rejected under section 3 of the Limitation Act, unless the period is extended under any of the provisions contained in sections 4 to 25 of the Limitation Act. Section 5 is one such section. It runs thus :

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[1] (1955) 2 M.L.J. 333.

> "Any appeal or application for review of judgment for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor when the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

> This section has not been made applicable to an application under Order 37, rule 3, of the Code. Therefore, the Court would have no power to extend the period of ten days prescribed by Article 159. We are not aware of any other provision of law under which the period for filing an application under Order 37 can be extended, except no doubt where fraud is alleged, in which case section 18 of the Limitation Act would apply".

The learned Judges held that section 5 of the Limitation Act was inapplicable to applications under Order 37, rule 3, which were governed by Article 159 and on that ground set aside the order of the lower Court which had excused the delay in filing that application. The learned Chief Justice has referred to the earlier decisions of this Court bearing upon the proper construction of Order 37, rule 2 and while disapproving the opinion expressed by Mack, J., in *Murahari Rao* v. *Bapayya*[1], and of Govinda Menon J., in *Srinivasan* v. *Baktavatsalu Naidu*[2], approved the decision of Chandra Reddi, J., in *James Manickam* v. *Jaya Narayana Daga*[3]. All these however related to the power of the Court to condone the delay in filing an appliction for leave to defend under Order 37, rule 3. But learned counsel for the petitioner urged that if the Court had no power to extend the time in a case governed by Order 37, rule 3, on the facts of the present case on 20th September, 1954, when the suit stood adjourned without an application for leave to defend the suit having been filed by the respondent, it would be illogical to hold that merely because a decree had been passed on that date and an application was made to set aside that *ex parte* decree the Court obtained power to grant leave to defend under Order 37, rule 4. In my judgment however the logic which the learned counsel for the petitioner urges cannot override the positive provisions enacted in Order 37, rule 4 and the matter must therefore be decided not by reference to the scope of Order 37, rules 2 and 3, as interpreted by this Court but on the terms of the language employed in the relevant provision—rule 4. The terms of rule 4 are not ambiguous and leave no room for argument. It states that after decree the Court may under special circumstances, set aside the decree and give leave to the defendant to defend the suit—words of wide amplitude which place no restriction on the power of the Court. The discretion here vested in the Court is no doubt judicial. I might at once point out that the only question now urged before me is as regards the jurisdiction of the Court and not whether this jurisdiction was properly exercised. Learned counsel for the petitioner urged that though the language of rule 4 was wide, it must be given a limited operation and the Court should by a process of construction read the provision as meaning that in cases where the defendant had appeared in answer to the summons under rule 2 and had allowed the period of 10 days within which he could have filed an application for leave to defend, to expire, he could not be granted leave to defend under rule 4. In other words the construction for which learned counsel contended was, that rule 4 only applied to cases where the *ex parte* decree was being set aside on the ground that there had not been a proper service of summons and not to a case where the decree was set aside because the defendant who was served had sufficient cause for non-appearance. In my opinion to uphold this argument would be not to construe the section but to legislate, for without adding words to the rule the result which counsel has in view cannot be achieved.

Further it does not appear to me that the decisions of this Court which have all been referred to and summarised in *Shah Mohammad Khan* v. *Woodfall*[4], logically involve the conclusions urged by Mr. Rattan, counsel for the petitioner. It is no doubt true that Mack. J., held that a Court derived the power to condone the delay in filing an application under rule 3 by reason of the provisions contained in rule 4 and the learned Judge was held to be wrong in his construction of Order 37, rule 3. But the converse does not follow that if an application under Order 37, rule 3, is barred by limitation, an application under Order 37, rule 4, should also be rejected on the same ground. The above reasoning was thus referred to by the learned Chief Justice at page 335 :

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[1] (1949) 1 M.L.J. 514.
[2] (1953) 2 M.L.J. 180.
[3] (1953) 1 M.L.J. 825.
[4] (1955) 2 M.L.J. 333.

> " We are unable to see how Order 37, rule 4, has any bearing on this question. That provision refers to a stage after decree."

It was the same reasoning that is to be found in the judgment of Chandra Reddi, J., in *James Manickam* v. *Jaya Narayan*[1]. Referring to Order 37, rule 3, the learned Judge said :

> " It does not follow that a Court has power to extend time or condone the delay in filing an application for leave to defend within the prescribed time, merely because the Court is invested with power to set aside decrees under special circumstances under Order 37, rule 4."

It has to be admitted that the point urged by learned counsel is not covered by any express decision and the matter is *res integra*. It has therefore to be decided on proper construction of the terms of the provision. Viewing it thus I have reached the conclusion that just as the existence of Order 37, rule 4, is not a ground for holding that there is a power to condone delay or extend the period of limitation for filing an application under Order 37, rule 3, the provisions of Order 37, rule 3 and the period of limitation prescribed within which such an application could be filed, do not restrict the power of the Court to grant leave to defend when such an application has been preferred by a party who has entered appearance in pursuance of a notice under Order 37, rule 2, but as against whom an *ex parte* decree has been passed.

The Court below had jurisdiction to pass the order in I.A. No. 1102 of 1954. The Civil Revision Petition fails and is dismissed. As the point is not covered by any authority, there will be no order as to costs in this revision.

V.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

Antony Bernard Pinto and another .. *Petitioners**

v.

Cecillia Fernandes Bai and another .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 147 and 148—Disputes relating to land—Costs of proceedings ordered by a Magistrate—Subsequent civil suit—Right of the successful party in the civil suit to recover back the costs paid in the criminal proceedings.

It is true that orders passed by a Magistrate in disputes under section 147, Code of Criminal Procedure, are subject to any subsequent decision of a civil Court of competent jurisdiction. But the mere fact that the rights of parties in regard to the matter in dispute have become crystallised by a subsequent decision of a Civil Court and the order of the Magistrate has been varied or set aside does not by itself have the effect of varying or altering also the order for costs under section 148 of the Code of Criminal Procedure awarded by the Magistrate in the earlier criminal proceedings. Unless the civil Court specifically sets aside also the order for costs made by the Magistrate the successful party in the civil proceedings cannot recover back the costs paid by him in the criminal proceedings.

Mohideen Kariva v. *Perianavakan*, A.I.R. 1925 Mad. 233, referred and doubted.

Ambalal Voza v. *Punjabai Pandya*, A.I.R. 1943 Bom. 129, followed.

Chintaman Ramjikant v. *Govind Bithal*, A.I.R. 1938 Nag. 376, doubted.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Mangalore, dated 3rd August, 1955 and made in S.C.S. No. 131 of 1955.

G. K. Govinda Bhat, for Petitioners.

K. S. Hegde and *M. Gopalakrishna Shetty*, for Respondents.

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[1] (1953) I M.L.J. 825 at 827.

* C.R.P. No. 115 of 1956. 21st September, 1956.

The Court delivered the following

JUDGMENT.—This revision is filed by the defendants in a small cause suit in which the plaintiffs claimed to recover from the defendants the costs awarded by the Magistrate in his order under sections 147 and 148, Criminal Procedure Code. It would appear that the plaintiffs closed a sluice and caused obstruction to the defendants' alleged right to the flow of water through that sluice. That led to disputes between the parties and so proceedings were taken under section 147, Criminal Procedure Code. The order of the Magistrate was to restrain the plaintiffs from causing obstruction with regard to the defendants' right to the flow of the water. Further the Magistrate, in exercise of the powers conferred on him under section 148 (3), Criminal Procedure Code, also directed the plaintiffs to pay the costs of those proceeding to the defendants. Subsequently the plaintiffs instituted O.S. No. 41 of 1951, on the file of the District Munsif's Court, Mangalore, for restraining the defendants from allowing the water into the plaintiffs' plot. That suit resulted in a decree with costs in favour of the plaintiffs. In the meanwhile the defendants had recovered from the plaintiffs costs awarded to them by the Magistrate. But, it will be seen that in the judgment and decree passed in that suit, there was no reference whatever to the costs awarded by the Magistrate. The plaintiff instituted the small cause suit out of which this revision arises to recover back from the defendants the costs ordered in their favour by the Magistrate, and the Small Cause Judge decreed the suit. Against the decree the present revision has been filed.

The contention for the present petitioners-defendants is that the costs awarded by the Magistrate stand unaffected by the subsequent proceedings in O.S. No. 41 of 1951, and though the plaintiffs succeeded in that suit the order for costs passed by the Magistrate holds good and therefore the plaintiffs are not entitled to recover the same by means of this suit. On the other hand, the contention for the plaintiffs which was accepted by the trial Court was that once an order of the Magistrate was varied by a decree of a civil Court in regard to the rights of parties, in consequence of that decree the order of the Magistrate in regard to costs also must be deemed to have been set aside and therefore the plaintiff would be entitled to recover costs in this suit. Though the order as to costs passed by the Magistrate is provided for under section 148 (3), Criminal Procedure Code, it must be taken that it is part of the order which the Magistrate passed under section 147. It will be seen that by virtue of section 147 an order of the Magistrate passed under that section shall be subject to any subsequent decision of a civil Court of competent jurisdiction. If therefore the order as to costs passed by a Magistrate under section 148 (3) should be deemed to be part of his order passed under section 147, then that part of the order of the Magistrate relating to costs must also be subject to the decision of a Civil Court of competent jurisdiction. That appears to me to be the proper view to take in this matter ; though Devadoss, J., in *Mohideen Kariva* v. *Perianavakan*[1], in dealing with the analogous case of a claim suit under Order 21, rule 63, Civil Procedure Code, held that the costs of the claim petition should not be allowed in favour of the successful plaintiff in the suit. According to that view, the costs in the claim petition will remain unaffected by the results of the subsequent claim suit under Order 21, rule 63, Civil Procedure Code. But that view has been held to be unsupportable in *Ambalal Voza* v. *Punjabai Pandya*[2]. Where Divatia, J., observed at page 132 :

> "The Madras view that the Court hearing the suit has no power to change the order of costs s also, in my opinion, not correct".

If the opinion expressed by Devadoss, J., is not correct, that is to say, assuming that the Court trying a claim suit has got the power to vary an order of the executing Court as to costs of the claim petition, in this case the question is whether on similar principle the order of the Magistrate awarding costs has been set aside or modified by the civil Court in O.S. No. 41 of 1951. It will be seen from a copy of the judgment (Exhibit A-4) that there was no prayer at all in that suit in regard to costs awarded by the Magistrate and the judgment and decree are silent on that matter. It cannot therefore be said that the Civil Court of competent jurisdiction has varied or set aside the order of the Magistrate in regard to the costs. So long as that order has not been so varied or set aside, it would follow that it would not be recoverable by an independent suit. In the Bombay case cited above, the petitioner had obtained a decree against one Jeevanlal and in execution attached certain lands belonging to the judgment-debtor. The opponent applied for raising the attachment. The application was dismissed with costs on the ground that the opponent was not in possession of the property. Thereafter the petitioner recovered the costs of these preceedings from the opponent. The opponent then filed a suit under Order 21, rule 63, for a declaration that this suit property was not liable to attachment and sale in execution of the petitioner's decree. It was held that the opponent was entitled to a declaration that the suit property was not liable to be sold in execution of the decree. Thereafter the opponent applied under section 144, Civil Procedure Code, for a refund of the costs which the petitioner had recovered *from him on the ground that* the executing Court's order was set aside by the decree in the regular suit. It was held by the lower Courts that the applicant would be entitled to refund because as a result of the decree in the regular suit the order of costs in the claim proceedings became unjust and inequitable so that the opponent was not entitled to keep the costs which he had recovered. But in the High Court Divatia, J., held that the order of costs made by the executing Court in the claim proceedings is not automatically set aside if the party against whom it is made succeeds in the regular suit. He pointed out that in the claim proceedings the order consisted of two parts (1) allowing or rejecting the claim and (2) awarding or refusing costs. Setting aside first part of the order in the regular suit does not automatically set aside the second part. I respectfully agree with that decision. The learned counsel for the plaintiffs-respondents brought to my notice a decision of the Nagpur High Court in *Chintaman Ramjikant* v. *Govind Bithal*[1], which supports his contention. But that decision has been dissented from in the Bombay decision referred to above and is also not in consonance with the decision of our High Court.

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[1] A.I.R. 1925 Mad. 233.

[2] A.I.R. 1943 Bom. 129.

The result is that in this case the order of the Magistrate awarding costs has not been modified or set aside by the decree in the subsequent civil suit. It was only in regard to the rights of the parties that the order of the Magistrate was set aside.

That did not affect the other part of the Magistrate's order regarding costs. That being so, it is not open to the plaintiffs to institute this small cause suit to recover the costs.

This revision is therefore allowed, and the suit will stand dismissed with costs in both the Courts.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

G. Alavandar .. *Petitioner**.

Press and Registration of Books Act (XXV of 1867), *section* 3—*Requirement as to the disclosure of the name of the printer and press on any printed material—Validity—If opposed to Article* 19 (1) (*a*) *of the Constitution of India.*

The object of section 3 of the Press and Registration of Books Act seems to be twofold. First that the executive authorities should know where a particular press is situated and who is the person in charge of the press. Secondly the public who might stand to be in any way affected by any publication should know who the responsible printer and publisher is so that they might seek their remedies against them.

Viewed against the background of the development of the doctrine of the freedom of speech and expression it cannot be said that the provisions of section 3 of the Press and Registration of Books Act is unconstitutional. It does not amount to an unreasonable restriction of any fundamental right guaranteed under Article 19 (1) (*a*) of the Constitution of India.

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[1] A.I.R. 1938 Nag. 376.

* Cr. R. C. No. 885 of 1955. 24th October, 1956.
(Cr. R. P. No. 839 of 1955).

The freedom of the press in India is no higher than that of a citizen and no special privilege attaches to the press as distinguished from the members of the public. Hence it is not an unqualified right and the press is not exempt from the ordinary law of civil and criminal libel, contempt of Court, obscenity and acts of violence against State and organised Government. Section 3 of the Act is intended only to prevent the freedom from degenerating into license without remedy to the citizen and the State.

History of the Law of Freedom of Press in the U. S. and U. K. traced.

Petition unders sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Fifth Presidency Magistrate, Egmore, Madras, dated 19th October, 1955, and passed in C.C. No. 10098 of 1955.

A. Madhavan for *Messrs. Row and Reddy*, for Petitioner.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) for State.

The Court delivered the following

JUDGMENT.—This Criminal Revision is directed against the conviction and sentence of the learned Fifth Presidency Magistrate, Madras, in C.C. No. 10098 of 1955.

The facts are : The Revision Petitioner Alavandar is the keeper of the Jana Sakthi Press at No. 38, Mount Road, Madras-6. It was found from two pamphlets entitled " Madras Preparatory Committee 5th World Festival of Youth and Students for Peace and Friendship " and its Tamil equivalent, that the petitioner had failed to print on them the name of the printer and the press as required under section 3 of the Press and Registration of Books Act, 1867, and Rule 2 of the Rules framed under section 20 of the said Act. Therefore the Chief Presidency Magistrate filed a complaint under section 12 of the aforesaid Act.

The statement of this Alavandar was that he was the keeper of the Jana Sakthi Press, that the pamphlets in question were printed at the said Press, that the name of the printer and the press as required under section 3 of the Press and Registration of Books Act and Rule 2 of the Rules have not been printed and that the omission to print the name of the printer and the place of printing was due to oversight. But he pleaded not guilty as he contended that section 3 of the impugned Act was inconsistent with the fundamental right guaranteed under Article 19 (1)(*a*) to all citizens, *viz*., the right to freedom of speech and expression. The learned Magistrate who was requested to make a reference under section 432 (2) of the Code of Criminal Procedure, declined to do so on the ground that first of all there was no restriction of the right to the freedom of speech and expression and secondly, that even if there was such a restriction, it was a reasonable restriction imposed in the interests of the general public and saved by Article 19 (6) of the Constitution of India. Therefore, he found the accused guilty and sentenced him to pay a fine of Rs. 4. Hence this Revision.

Act XXV of 1867 as amended by Act XIV of 1922 is an Act for the regulation of Printing-presses and Newspapers, for the preservation of copies of books printed in British India, and for the registration of such books. The preamble states :

> " Whereas it is expedient to provide for the regulation of printing-presses and of periodicals containing news, for the preservation of copies of every book printed or lithographed in British India, and for the registration of such books ".

Section 3 with which alone we are concerned here states :

> " Every book or paper printed within (British) India shall have printed legibly on it the name of the printer and the place of printing, and (if the book or paper be published) (the name) of the publisher and the place of publication ".

An omission to comply with section 3 is punishable under section 12 of the said Act. In order to understand section 3, we must also bear in mind section 4, which states:

> " No person shall, within (British) India, keep in his possession any press for the printing of books or papers who shall not have made and subscribed the following declaration before the Magistrate within whose local jurisdiction such press may be :

'I, A. B., declare that I have a press for printing at......'

And this last blank shall be filled up with a true and precise description of the place where such press may be situate".

The object and scope of sections 3 and 4 appear to be a double-motived one. The first is that the executive authorities shall note where the press is situated and the second is that they shall know who is the person in charge., A removal of the premises clearly deprives the executive authorities of their knowledge as to the location of the press. But the same cannot be said where there is a change in the personnel of the keeper of the press: *Raghubar Singh* v. *Emperor*[1]. The Act does not require a new declaration in cases where a press, as to which the printer has made the declaration prescribed by section 4 is changed to another locality within the same local jurisdiction as the former place. There is no clause in section 4 of the Act corresponding to the provisions of section 5 requiring a new declaration as often as a change of place takes place: *Bava Narain Singh* v. *Empress*[2]. The further object of this section seems to be that members of the public who might be slanderously or defamatorily attacked can always resort to the civil Courts for their remedies against the publication of such slanderous and defamatory matter. This would not be possible if the printers and publishers are able to shroud themselves in a cloak of anonymity and carry on their nefarious cloak-and-dagger business without any possibility of their being successfully discovered. That is why it has been held when a newspaper printed and published bearing the following words "Printed and published at Cochin for the Malabar Economic Company at the Company's Goshi Vilasam Press"were held not to satisfy the requirements of the Act. Printers and Publishers cannot be allowed to select for themselves the description to be used in professing to comply with the provisions of the Act but they must use the desctiptions prescribed by the Act. *Hari* In re;[3] *Queen Empress* v. *Harishenoy*[4]; *Emperor* v. *Bhawani Das*[5].

In other words, the intention of section 3 requiring that the name of the printer and the place of printing and the name of the publisher and the place of publicaton should be printed legibly on every book or paper was to inform the public who the responsible printer or publisher was and to convey that information on the face of the paper. The word "publisher" has been used in the Act in a restricted sense and does no include the vendor of the newspaper or book. *Queen Empress* v. *Banka Patni*[6], Section 12 read with section 3 clearly indicates that such persons are not included in publishers. But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of section 3 and section 12 of the Act: *Jote Prasad*, In re[7]. For a good commentary on this[1] 867 Act, *See* Rai Bahadur G.K. Roy's Law Relating to Press and Sedition page, 70 and following.)

The provisions of the Act have to be viewed against the background of the freedom of speech and expression guaranteed under Article 19 (1)(*a*) of the Constitution of India.

Article 19 (1) (*a*) guarantees freedom of speech and expression. The word "speech" means a formal discourse in public, while the word "expression" represents generally an utterance of one's thoughts or feelings, whether by word of mouth, writing, printing, picture or in any other manner. Freedom of expression includes not only the freedom of Press, but the expression of one's ideas by any visible representation, such as by gestures and the like. Freedom of speech obviously includes freedom of discussion and has been interpreted to include all that may be said to be covered by "freedom of expression".

In England their Lordships of the Privy Council observed in *Arnold* v. *King Emperor*[8] :

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1. A.I.R. 1931 Oudh 81.
2. 9 P.R. 1889 (Cr.).
3. 1 Bom. Cr. C. 70.
4. (1893) 3 M.L.J. 201 : I.L.R. 16 Mad. 443.
5. (1909) 2 I.C. 978 : 5 P.R. 1909 (Cr.).
6. (1896) I.L.R. 23 Cal. 414.
7. (1887) 7 A.W.N. 95.
8. (1914) 26 M.L.J. 621: I.L.R. 41 Cal. 1023: L.R. 41 I.A. 149 (P.C.).

> "The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do make him more careful; but the range of his assertions, his criticism or his comments, is as wide as, and no wider than, that of any other subject",

The Constitution of the United States specifically guarantees the freedom of the Press on the recognition of the special importance of the Press as an organ of publicity. But though the First Amendment does not itself lay down any qualifications to the liberty of the Press guaranteed therein, English system and usage have been cited constantly as furnishing grounds for limiting and as a means of interpreting the right.

The Constitution of India follows the law of England in so far as it omits to mention freedom of the Press specifically in the gurantee of fundamental rights. The omission of reference to the liberty of the Press was merely due to the fact that express mention of the liberty of the Press was considered unnecessary: *Brij Bhushan* v. *State of Delhi*[1-2]. The freedom of the press in India is no higher than that of a citizen and no privilege attaches to press as distinguished from the members of the public. *State* v. *Ahmed*[3]. The freedom of speech and press are the same, involve the same legal principles and the same public interests. The press in its historic connotation comprehends every sort of publication. The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces handbills and literature, such as pamphlets and leaflets (*Jannison* v. *Texas*[4]; *Ladel* v. *Griffin*[5], which have proved most effective instruments in the dissemination of opinion: *Schmeeder* v. *Irvington*,[6]

But this freedom of speech and expression is not an unqualified fundamental right conferred upon the citizens of the Republic. In no country is there any absolule freedom of speech or expression, *United Public Works* v. *Mitchell*[7], *Sehnu* v. *Latchman Das*[8]. The right is not absolute and unlimited at all times and under all circumstances, *Whitney* v. *California*[9], *Stromberg* v. *California*[10], *Kodacs* v. *Cooper*[11], *Termienals* v. *Chicago*[12], and does not give immunity to every possible use of language. *Chaplinsky* v. *New Hampshire*[13], *Schneck* v. *U.S.*[14], *Frowher K.* v. *U.S.*[15]. In *Gillow* v. *New York*[16]. Sanford, J., observed:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish without responsibility, whatever one may choose, or an unrestricted licence that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. Reasonably limited......this freedom is an inestimable privilege in a free Government; without such limitation it might become the scourge of the Republic. That a State, in the exercise of its Police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace is not open to question. And for yet more imperative reasons, a State, may punish utterances endangering the foundations of organized Government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press....does not protect disturbances of the public peace or the attempt to subvert the Government. It does not protect publications prompting the overthrow of Government by force, the punishment of those who publish articles which tend to destroy organised society being essential to the security of freedom and the stability of the State. By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organised Government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger, of substantive evil, that they may be penalized in the exercise of its police power. We cannot hold that the present statute is an arbitrary or unreasonable exercire of the power of a State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality".

See also the leading decision of *Near* v. *Minnesota*[17].

[1-2] (1950) 2 M.L.J. 431: 1950 S.C.R. 605: 1950 S.C. 129 (S.C.).

[3] A.I.R. 1954 Hyd. 176.

[4] 87 L.Ed. 869.

[5] 82 L.Ed. 949.

[6] 84 L.Ed. 155.

[7] 91 L.Ed. 754.

[8] A.I.R. 1952 H.P. 41.

[9] 71 L.Ed. 1095.

[10] 75 L.Ed. 1117.

[11] 93 L.Ed. 513.

[12] 92 L.Ed. 1132.

[13] 86 L.Ed. 1031.

[14] 63 L.Ed. 470.

[15] 63 L.Ed. 561.

[16] 69 L.Ed. 1138.

[17] 283 U.S. 697.

Similarly in the words of Blackotone :

> "The liberty of the press consists in laying no previous restraints upon publications. .... not in freedom from censure for criminal matters when published." (Blackstone's Commentaries Volume IV, pages 151-152).

As Dicey puts it :

> "The simplest way of setting forth broadly the position of writers in the Press is to say that they stand in substantially the same position as letter-writers".

The liberty of the press is a mere application of the principle that no man is liable to be punished or condemned in damages except for a breach of law. Any person may publish what he pleases without obtaining any previous licence subject to the law of libel. To quote Lord Ellenborugh:

> "The law of England is the law of liberty, and consistently with this liberty we have not what is called an imprimatur ; there is no such preliminary licence necessary but if a man publishes a paper he is exposed to the penal consequences as he is in every other act, if it be illegal". *Rex* v. *Cobbett*[1]; See also *The King* v. *The Dean of Saint Asaph*[2].

In the words of Lord Mansfield:

> "The liberty of the press consists in printing without any previous license subject to the consequences of law".

Both American and Indian standard text-books on the Constitution indicate that this is the sum total of freedom of the press: (1) Amercian : Cooley on Constitutional Limitations, Volume II, page 883 (Eighth Edition); Willis on Constitutional Law, page 489 and foll; Rött schaffer on Constitutional Law (Homebook series) section 313, page 756 and foll; (2)(Indian): Chaudhri: Constitutional Rights and Limitations, Volume 1, page 447 and foll. A.I.R. commentaries on the Constitution of India Volume 1, Note 27 and foll. page 396 and foll; Basu: Constitution of India, Second Edition, page 98 and foll. N.R. Raghavachariar. The Constitution of India, page 59 and foll ; Aggarwala : Fundamental Rights and Constitutional Remedies, Volume 1, page 284 and foll.

To sum up, liberty of the press, as now understood and enjoyed, is of very recent origin. It is not mentioned in the English Petition of Rights. The term itself means only the liberty of publication without the previous permission of the Government, *i.e.*, neither Courts of Justice, nor any other Judges whatever are authorized to take notice of writing intended for the press, but are confined to those which are actually printed. The same idea is incorporated in the American Bill of Rights. There is no licensing or censorship of literature of any kind in times of peace, but the guarantee does not exempt the press from the ordinary law of civil and criminal libel, contempt of Court, obscenity, or in respect of acts of violence against the State and organized governments. Thus the freedom of speech and expression in substance is freedom from any provision which even indirectly amounts to censorship. Courts have in general construed freedom of press so as to preserve the fundamental value intended to be protected by the constitutional provisions protecting them. *Brij Bhushan* v. *State of Delhi*[3], *Srinwasa* v. *The State of Madras*[4], *Bharath Press*, In re[5]. *Amarnath* v. *State of Punjab*[6], *Pattamal Arumugam*, v. *The Chief Presidency Magistrate*[7].

Thus it will be noticed that the impugned section 3 does not in any way restrict the freedom of expression. On the other hand to maintain unimpaired that freedom of expression but at the same time to prevent that freedom from degenerating into licence without remedy both for the State as well as individual citizen in regard to defamatory, seditious, blasphemous, obscene statements and contempts of Courts, the State in the exercise of its police powers insists upon the furnishing of the information set out above. There is no allegation in general or even a suggestion in the present case where the printer and publisher has apologised for omitting the particulars by oversight, that this provision has in any way impaired the freedom of expression. Healthy public Presses conducting their affairs above board constitute the bulwark of the State ; and secretive and anonymous presses working underground constitute a menace to society. The arms which a publisher and printer should carry must be those of a warrior and not that of an assassin. The cloak-and-dagger type of publishing and printing has no place in our Sovereign Indian Republic where our fundamental rights have been guaranteed by the Constitution and the citizens are :

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[1] 29 St. Tr. 49.

[2] (1789) 100 E.R. 657.

[3] (1950) 2 M.L.J. 431 : (1950) S.C.R. 605: (1950) S.C.J. 425 (S.C.).

[4] (1951) 1 M.L.J. 115 (F.B.)

[5] A.I.R. 1951 Pat. 12 (F.B,).

[6] A.I.R. 1951 Punj. 8.

[7] (1951) 2 M.L.J. 101.

> " Men who their duties know
> But know their rights and knowing dare maintain
>
> . . . .
>
> And sovereign law that states collected will over thrones and globes elate
> Sits empress crowning good, repressing ill."

There is no substance in the contention raised and which has been rightly rejected by the learned Magistrate. This Revision Case is dismissed.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Syed Haidar Sahib	.. *Appellant**
v.	
M. Jayaram Pillai and another	.. *Respondents.*

Companies Act (VII of 1913), *section* 227 (2)—*Scope—Winding up proceedings against company—Transfer of asset of company to creditor in discharge of debt due to him—Validity.*

Paying a creditor of a company by assigning an asset of the company, especially after the commencement of winding-up proceedings against the company, cannot be considered to be a *bona fide* transaction carried out or arising in the ordinary course of current business. A transfer of an asset the result of which would be to prefer one creditor to another is not countenanced by the Companies Act. A deed assigning an asset of the company after the commencement of the winding-up proceedings is therefore void under section 227 (2) of the Companies Act and unenforceable.

Tulsidas Jasraj v. *The Industrial Bank of Western India*, (1930) I.L.R. 54 Bom. 718, distinguished.

Appeal against the Decree of the Court of the Subordinate Judge of Chingleput in Appeal Suit No. 28 of 1952, preferred against the Decree of the Court of the District Munsif of Kancheepuram in Original Suit No. 42 of 1950.

P.C. Parthasarthy Ayyangar and *P. Parthasarathy Ayyangar*, for Appellant.

D. Ramaswamy Ayyangar and *N. K. Ramaswamy*, for Respondents.

The Court delivered the following

JUDGMENT.—The question for determination in this appeal is as to whether the assignment on which the plaintiff has instituted the suit is void under section 227 (2) of the Indian Companies Act.

The plaintiff, the first defendant and some others are subscribers in a chit conducted by the Commercial Funds, Ltd., Kancheepuram. The first defendant was the successful bidder in the auction held on the 1st of December, 1947. He received Rs. 2500 and executed an agreement, Exhibit A-1, with the second defendant as surety for a sum of Rs. 4300, being the amount of the unpaid instalments for the subsequent period. The plaintiff, however, did not bid in any auction, and he became entitled to recover Rs. 1103-8-0 from the Commercial Funds, Ltd. The Commercial Funds were not in a position to pay cash and hence, it is stated, the agreement Exhibit A-1 executed by the first defendant in favour of the funds was assigned over for a consideration of Rs. 650-14-0 which was the amount due by the Funds to the plaintiff under Exhibit A-2. It is not disputed that on the date of the assignment winding-up proceedings of the Company had been initiated and commenced and the Official Receiver Chingleput, appointed as the Official Liquidator. It is contended that the assignment is void and not enforceable.

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* S.A. No. 2443 of 1952. 9th February, 1956.

On the plain language of section 227 (2) of the Act there can be no difficultly in upholding the view taken by the lower Courts that the transaction is void, the winding-up proceedings having commenced prior to the date of the assignment. But it is contended by Mr. Parathasarathi Ayyangar, relying on the decision in *Tulsidas Jasraj* v. *The Industrial Bank of Western India*[1], that it is not *ab initio* void, for certain transactions can be excepted from the mischief of section 227 (2) of the Act, and the learned advocate relies on the following observations of the learned Judges in that decision, occurring at page 742 :

> " Now here as regards section 227 (2) the Courts has to steer a middle course between two extremes. On the one hand the words of the section are wide enough to include any sale or payment that a company may make after the date of the winding-up petition. On that basis any business would practically have to be stopped if a petition was presented, because it would be unsafe to dispose of any of the company's assets."

The learned Judges further observed :

> " Consequently, the Court has very properly laid down that speaking generally any *bona fide* transaction carried out and completed in the ordinary course of current business will be sanctioned by the Court under section 227 (2) ".

Here it cannot be pretended that paying a creditor by assigning an asset of the company, especially after the commencement of the widing-up proceedings, could be considered to be a *bona fide* transaction carried out or arising in the ordinary course of current business. What the learned Judges in that decision had in mind was any payment necessary for running a business may be excepted and in respect of that too, the Court must find whether it was a transaction conducted *bona fide*, but not as in the present case, where there is a transfer of an asset, the result of which would be preferring one creditor to another which is not countenanced by the Act. It would have been open to the plaintiff to have applied for the sanction of the Company Court for such a transaction and, in the absence of any such transfer, the view taken by the Courts that under section 227 (2) the assignment is void is correct and does not require any interference.

The Second Appeal is dismissed with costs. (No leave.)

P.R.N. ——— *Appeal dismissed. Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Komath Ponnian Scoppi .. *Appellant**

v.

Rayaroth Kanaran and another .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), sections 17 (a) and 44—Construction and scope—Renewal of kanom —Landlord's right to increase michavaram or purapad—Conditions—Surrender of holding by kanomdar and fresh renewal with enhanced michavaram—Validity of—Absence of consideration for increase in michavaram—Effect.

Under section 17 (*a*) of the Malabar Tenancy Act, on the expiry of the knanom, there is a statutory right conferred on the kanomdar, which he could enforce by means of an application to the Court to obtain a renewal after he pays to his immediate landlord the amount of the renewal fee as calculated under the section. The renewal contemplated is a renewal on the same terms as the previous kanom. If the landlord is unwilling or refuses to grant a renewal on the identical terms as the existing kanom, there is right in the kanomdar to resort to a Court of law and get a compulsory renewal on the same terms if he pays the renewal fee as contempated in section 17 (*a*). It is not open to the landlord to stipulate a higher rate of michavaram as opposed to the provisions of the Act.

Ukkali v. *Sivarama Pattar*, (1941) 1 M.L.J. 113, followed.

There is however nothing in section 17 (*a*) which prevents a landlord from increasing the rent at the time of renewal if there is specific consideration for the same ; otherwise such an increase would be a contract without consideration, because any increase of rent is against the provisions of the Statute. Where there is a valid consideration for the increase of purapad or michavaram, *e.g.*, increase in the Government revenue payable by the landlord in respect of the demised land, it cannot be said that such an increase for reasons beyond the control of the landlord is opposed to the Act.

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[1] (1930) I.L.R. 54 Bom. 718.

* S.A.Nos. 1448 and 1794 of 1952. 3rd April, 1956.

Kunchu Menon v. *Narayanan Ezutessan*, (1914) 16 M.L.T. 317 ; *Nanu Nair* v. *Moorthi Nambudripad*, 1 L.W. 509 and *Natruvath Pappu* v. *Kolli Vaiappil Kalathile Vithil*, 1911 M.W.N. 236, relied on.

But it is not open to the landlord to raise the michavaram at his will and pleasure. There must be some circumstance justifying the enhancement and the contract must be fully supported by consideration. Without specific consideration or justification, there can be no increase of rent or purapad in the case of renewals under section 17 of the Malabar Tenancy Act.

Mallikarjuna Rao v. *Tripurasundari*, (1953) 2 M.L.J. 313 and *Dhanakoti Pillai* v. *Narayana Iyer*, (1955) 2 M.L.J. 569, applied.

Section 44 of the Malabar Tenancy Act confers on the tenant a privilege to surrender his holding at the expiry of the demise, and if the transaction is above board and in the usual course of circumstances there can be no objection to such a surrender. If a kanomdar surrenders his rights under an existing kanom and then takes a fresh document there is nothing to be said against such a transaction and it would be a valid one. But where it is a device to get over section 17 (*a*) of the Act (to enhance the michavaram without any additional consideration), the renewal cannot be upheld and must be discountenanced.

Kunhu Kuttan v. *Imbichikuttan*, (1936) 71 M.L.J. 728 ; *Lakshmi Amma* v. *Kunhi Raman*, 1932 M.W.N. 543 ; *Koppasa Menon* v. *Kalliani Ammal*, (1923) 45 M.L.J. 258 and *Trivikrama Konuraya* v. *Sankaranarayana*, (1932) 63 M.L.J. 743 : I.L.R. 56 Mad. 92 (F.B.), Applied.

Appeal against Decree of the Court of the (Additional) Subordinate Judge of Tellicherry in Appeal Suit No. 96 of 1951, preferred against the decree of the Court of the (Additional) District Munsif of Tellicherry in Original Suit No. 168 of 1948.

C. S. Swaminathan for Appellant and

M. C. Sridharan for Respondent in S.A. No. 1448 of 1952.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Appellants and

A. Achuthan Nambiar for Respondent in S. A. No. 1794 of 1952.

The Judgment of the Court was delivered by

Govinda Menon, J.—As the question of law involved in these Second Appeals was considered an important one by Krishnaswami Nayudu, J., they have come up for decision, before a Bench.

Second Appeal No. 1794 *of* 1952.—The plaintiff who is the *appellant filed a suit for arrears of* rent from 1945 to 1950 on foot of a registered kanom marupat, Exhibit A-1, dated 6th October, 1945, under which defendants were to pay an annual rent of Rs. 8 along with certain sundries. The defence to the suit was that under an earlier document, Exhibit B-1, dated 7th January, 1918, which had been renewed by Exhibit A-1, the rent payable was only Rs. 4-12-0, and the increase of rent by the renewed demise was opposed to the provisions of the Malabar Tenancy Act and as such the plaintiff is not entitled to recover the difference. The Lower Appellate Court found following the decision in *Ukkali* v. *Sivarama Krishna Pattar*[1], that in the case of a kanom demise, there can be no enhancement of the purapad payable at the time of renewal and therefore the increase under Exhibit A-1 was not justified. The question is whether the agreement to pay a higher rent by a kanomdar or kuzhikanomdar at the time of renewal is valid and enforceable.

Mr. Kutti Krishna Menon for the appellant relies upon certain provisions of the Malabar Tenancy Act, Madras Act (XIV of 1930) where certain statutory provisions are enacted " in the absence of a contract to the contrary ", whereas in section 17 (*a*) of the Act which relates to renewals there is no such distinguishing feature. Under these circumstances it is contended that it is open to the landlord despite the provisions of section 17 (*a*) to enter into an agreement with the kanomdar with regard to fixing of michavaram, renewal fee and the like. What is contemplated by section 17 (*a*) is that a kanomdar shall on the expiry of the kanom under which he holds, be entitled to claim and his immediate landlord shall be bound to grant a renewal enuring for a period of 12 years *of the same* on payment as renewal fee, of two and one-fourth times the balance of the annual fair rent of the lands covered by the kanom after deducting the annual revenue payable on the kanom property to the Government if payable by the kanomdar under the kanom deed (2) the annual interest on the kanartham and (3) the annual michavaram payable under the previous kanom. It is clear from this provision that on the expiry of the kanom there is a statutory right conferred on the kanomdar which he could enforce by means of an application to the Court by sections 22 onwards to obtain a renewal after he pays to his immediate landlord the amount of renewal fee as calculated under this provision. In so computing the renewal fee, the annual michavaram payable under the provisions of the kanom deed alone has to be taken and the terms should be the same as in the previous kanom which is sought to be renewed. As the section does not begin by enumerating that the provisions are in the absence of a contract to the contrary, comparing certain other sections which state specificially "contract to the contrary", the learned counsel contends that whatever might be the statutory provision under section 17 it is open to a kanomdar and his landlord to contract out of it, if such a contract is not vitiated by any of the infirmities contemplated by the Indian Contract Act such as fraud, undue influence or the like. Our attention is invited to section 10 which speaks of the cultivating verumpattamdar's right to fixity :

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[1] (1941) 1 M.L.J. 113.

> "Notwithstanding any contract to the contrary entered into whether before or after the coming into force of the Act every cultivating verumpattamdar shall have fixity of tenure in respect of his holding......"

Similarly section 22 begins by saying

> "Notwithstanding any contract to the contrary (whether made before or after the commencement of this Act) a customary verumpattamdar, kanomdar or kuzhikanamdar shall be entitled to apply to the Court in the form presribed for the execution of a renewal deed......".

Section 32 also says

> "Notwithstanding any contract to the contrary express or implied whether entered into before or after the coming into force of this Act no cultivating verumpattamdar shall be liable to pay to his landlord anything more or anything else than the fair rent and no tenant who is entitled to claim a renewal under this Act shall for the purpose of obtaining the renewal be liable to pay as renewal fee anything more or anything else than the renewal fee provided by this Act".

The fact that the Legislature had thought fit to make it impossible for the tenant to contract out of the Act in three instances referred to above is relied on by the learned counsel to show that it is possible for the landlord while renewing a kanom to impose his own terms apart from what the section provides if the kanomdar, tenant, is willing and agreeable to act upon such terms. In *Ukkali* v. *Sivaramakrishna Pattar*[1], this Court has held that the word "same" in section 17 of the Malabar Tenancy Act connotes renewal of the kanom on the same terms as the previous kanom. If the landlord declines to grant a renewal on payment of the proper renewal fee, the tenant can seek the aid of the Court and the Court should grant the renewal of the kanam only on the same terms as the previous kanom. The principle underlying this decision is that if the landlord is unwilling or refuses to grant renewal on the identical terms as the existing kanom there is a right for the kanomdar to resort to a Court of Law and get a compulsory renewal on the same terms if he pays the renewal fee as contemplated in section 17, clause (*a*) of the Act. That being the case, it is not open to the landlord to stipulate a higher rate of michavaram as opposed to the provisions of the Act. In our opinion, the principle of law enunciated, cannot be questioned but there is nothing in section 17 (*a*) which prevents a landlord from increasing the rent at the time of renewal if there is specific consideration for such a renewal. Otherwise such an increase would be a contract entered into without consideration because any increase of rent is against the provisions of the statute. In the present case the original purapad of Rs. 4-12-0 fixed in 1918 was inclusive of Government revenue. The landlord had the obligation to pay Government revenue and if the kanomdar paid Rs. 4-12-0 there is no obligation cast on him to pay the annual Government revenue but under the renewal,

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[1] (1941) 1 M.L.J. 113.

Exhibit A-1 the rent of Rs. 8 included in itself not only the Government revenue as it stood in 1918 but also the revenue enhanced after the settlement in the early thirties. Such being the case, there is a valid consideration for the increase of purapad and it cannot be said that such an increase for reasons beyond the control of the landlord is opposed to the provisions of the Act. If the purapad is not increased the original purapad might be less than the increased revenue at the time of the settlement. In the present case Exhibit A-1 clearly lays down that the amount of Rs. 8 was arrived at because there was an increase in the Government revenue as a result of the settlement in respect of the lands covered by the kanam. It has been laid down in a number of cases that where there is an usufructuary mortgage or kanam and the Government enhances the revenue payable during the pendency of such relationship then it is the mortgagee and not the mortgagor who is liable to pay the enhanced Government revenue. Vide *Kunchu Menon* v. *Narayanan Ezutessan*[1], *Nanu Nair* v. *Moorthi Nambudripad*[2], *Natruwath Pappu* v. *Kolli Vaiappil Kalathile Vitil*[3]. Apart from the provisions of the Transfer of Property Act, in Malabar where in many cases the increase of Government revenue at the time of periodical settlements has been due to improvements effected on the property by the tenant, the burden of such increase should be on the tenant. Usually in regard to lands on which fruit bearing trees such as cocoanut trees, arecanut trees and jack trees are planted the assessment per acre is computed with reference to the yield of the trees and if the trees are planted by the tenant as a result of which the Government revenue on the land gets enhanced the obligation to pay such enhanced revenue is on the tenant and not on the landlord. In cases where the landlord has demised an extent of land which could be converted into a garden by planting fruit bearing and other kinds of trees and on which at the time of the demise there were no trees, if the kanamdar or the tenant plants such trees as a result of which the land gets improved and consequently the tax is also enhanced, it stands to reason that the tax must be paid not by the landlord but by the person responsible for the increase in taxation. In the present case it can fairly be presumed that the increase in Government revenue was due to the planting of trees by the defendants. Mr. Achuthan Nambiar for the respondents contends that there is no evidence as to what exactly is the increase in Government revenue and as such a finding should be called for to ascertain that. We do not think that any such necessity arises because the original rent of Rs. 4-12-0 included Government Revenue then payable, and the enhanced rent of Rs. 8 also included enhanced Government revenue payable at the time of Exhibit A-1. Such being the case, it is easy to conclude that the difference of Rs. 3-4-0 was due to enhanced Government revenue. It follows therefore, that the plaintiff is entitled to get the purapad in accordance with the terms contained in Exhibit A-1. But it is not open to the landlord to raise the michavaram at his will and pleasure. There must be some circumstance justifying the enhancement and the contract must be fully supported by consideration. To take an analogous instance, as in the case of rate of interest provided for under the Madras Agriculturists Relief Act, if a debtor agrees to pay a higher rate of interest than what is provided for by the Act it has been held in *Mallikarjuna Rao* v. *Tripurasundari*[4], which has been followed in *Dhanakotti Pillai* v. *Narayana Iyer*[5], and also in Civil Revision Petition No. 232 of 1954 that a stipulation to pay a higher rate of interest is not supported by consideration and as such cannot be enforced. Following that principle it seems to us that without a specific consideration or justification there can be no increase of rent or purapad in the case of renewals under section 17 of the Malabar Tenancy Act.

The decisions of the lower Courts are, therefore, modified and the plaintiff will get a decree for higher rent on foot of the claim made in his plaint as stipulated in Exhibit A-1. The appellant will be entitled to his costs in this Second Appeal and the costs in both the lower Courts.

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1. (1914) 15 M.L.T. 317.
2. (1914) 1 L.W. 509.
3. 1911 M.W.N. 236.
4. (1953) 2 M.L.J. 313.
5. (1955) 2 M.L.J. 569.

Second Appeal No. 1448 *of* 1952.—Here also the question is as regards the payment of increased purapad. Unlike the previous Second Appeal, there was no renewal as such, which has now become the subject of consideration. The original kanam Exhibit A-1 dated 22nd November, 1933, was, under Exhibit B-2, dated 22nd October, 1945, ostensibly surrendered ; but four days thereafter under Exhibit A-4 there was a kanam, kuzhikanam deed executed by the same tenant to the same landlord. The lower Appellate Court has found that the surrender under Exhibit B-2 was only a nominal transaction got executed by the plaintiffs for the purpose of getting over the provisions of section 17 (*a*) of the Malabar Tenancy Act. The learned Subordinate Judge has given ample reasons for holding that the surrender was never intended to be acted upon. He has also found that there was in fact no surrender of possession but only a make-believe. Mr. C. S. Swaminathan, learned counsel for the appellant, contends that this finding cannot be accepted. He urges that it is open to a landlord to obtain a surrender of the holding from the tenant if he is willing to do so under section 44 of the Malabar Tenancy Act, which is

> "a kanamdar or kuzhikanamdar or customary verumpattamdar .... may at the end of any agricultural year surrender his holding to his immediate landlord, by a registered document".

That being the case, the privilege of surrendering the holding at the expiry of the demise is one granted by the Act and when between the parties there is an agreement that the previous relationship is to be put an end to by a registered document, there is nothing, according to the learned counsel, to prevent the erstwhile landlord and the quandom kanamdar to enter into a fresh kanam or kuzhikanam on new stipulations and terms. It is urged by the learned counsel that in the present case what has been done is the giving up of rights conferred under Exhibit A-1 by Exhibit B-2 and the creation of fresh relationship by Exhibit A-4. Analogous cases have arisen where a karnavan on behalf of his tarwad has renewed a kanam or granted melcharth of the same before the expiry of the original demise. Questions have arisen whether such a transaction is binding on his successor. In a number of cases it has been held that a surrender and re-grant are within the competence of the karnavan : See *Kunhukuttan* v. *Imbichikuttan*[1], *Lakshmi Amma* v. *Kunhi Raman*[2], *Koppassa Menon* v. *Kalliani Ammal*[3] ; *S. A. No.* 3 *of* 1931[4] and *C. M. A. No.* 406 *of* 192 [5]. It is therefore clear that if the transaction had been above board and in the usual course of circumstances there can be no objection to that. The Full Bench in *Trivikrama Konuraya* v. *Sankaranarayana*[6], has held that even a melcharth granted before the expiry of the term by a karnavan if assented to by the same karnavan when the original term had expired would be valid. Applying that principle if the kanamdar surrenders his rights under an existing kanam and then takes a fresh document there is nothing to be said against such a transaction. But the difficulty in this case arises from the fact that the lower Courts have found that Exhibit A-4 was a device to get over section 17 (*a*) of the Malabar Tenancy Act by which it is not possible to enhance the michavaram. As we have stated, in the judgment in S.A. No. 1794 of 1952 if there had been any additional consideration for enhancing the michavaram, then the renewal cannot be discountenanced on that score.

On the finding of the lower Courts that there is no such consideration, the decisions have to be affirmed and this Second Appeal dismissed with costs.

P.R.N. *S. A. No.* 1794 *decree modified.*
S. A. No. 1448 *dismissed.*

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1. (1936) 71 M.L.J. 727.
2. 1932 M.W.N. 543.
3. (1923) 45 M.L.J. 258.
4. (1935) 68 M.L.J. (N.R.C.) 23.
5. (1930) 59 M.L.J. (N.R.C.) 55.
6. (1932) 63 M.L.J. 743 : I.L.R. 56 Mad. 92 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

M. Subramaniam Chettiar and another .. *Appellants**

v.

Muthiah Pillai .. *Respondent.*

Limitation Act (IX of 1908), *Article* 181—*Applicability—Application for final decree in suit for redemption of mortgage—Period of limitation—Right to apply—When arises—Civil Procedure Code* (*V of* 1908), *Order* 34, *rule* 8.

An application for a final decree by a plaintiff-mortgagor who has obtained a preliminary decree for redemption is specifically provided for in Order 34, rule 8, Civil Procedure Code. The cause of action for an application for a final decree arises on payment or deposit of the amount fixed by the preliminary decree and the period of limitation for such an application is governed by Article 181 of the Limitation Act, which is three years from the date of the deposit. An application filed beyond three years of the deposit is clearly barred by limitation.

Angammal v. *Muhammad Sulaiman Lebbai*, (1945) 2 M.L.J. 239, distinguished and explained.

Appeal against the Decree of the Court of the Subordinate Judge of Pudukottai in Appeal Suit No. 61 of 1952, preferred against the Decree of the Court of the District Munsif of Pudukottai in I.A. No. 1212 of 1951 in Original Suit No. 1401 of 1933.

T. R. Ramachandran for Appellants.

V. Seshadri and *K. S. Ramamurthi*, for Respondent.

The Court delivered the following

JUDGMENT.—The question that arises for determination in this appeal is whether there is a period of limitation for an application by the mortgagor-plaintiff in a redemption suit to pass a final decree and whether Article 181 of the Limitation Act applies to such an application.

A preliminary decree for redemption was passed on the 21st June, 1936, granting two months' time for payment of the amount. The plaintiff paid the amount within the time fixed but did not make an application for passing a final decree directing the mortgagee to deliver the documents and possession of the property. He filed two execution petitions, E. P. Nos. 252 and 253 of 1949 in the Chief Court of Pudukottai but they were dismissed as being barred by limitation. This appeal arises out of the application filed by the plaintiff on the 2nd November, 1951, for passing a final decree. A plea of limitation was taken as the application was filed long after the expiry of three years and it was contended that Article 181 of the Limitation Act would apply to this case. The Courts below, relying on a decision of Somayya, J., reported in *Angammal* v. *Muhammad Sulaiman Lebbai*[1], took the view that there is no period of limitation fixed for an application of the present nature. There can be no doubt that the Courts below have not properly appreciated the effect of the decision relied upon. In that case a preliminary decree for redemption of an usufructuary mortgage was passed on the 15th October, 1935 and the time fixed for payment was 15th January, 1936. The plaintiff did not deposit the amount on or before that date ; nor did she ask for extension of time under Order 34, rule 7(2) of the Civil Procedure Code. She deposited the amount towards the end of 1942 and then applied on 2nd February, 1943, under Order 34, rule 8 of the Code asking the Court to pass a final decree with a direction to the defendant to deliver the mortgaged property. In that case the application by the mortgagor for passing a final decree was well within time as it was filed on the 2nd February, 1943, the deposit having been made about the end of 1942. But the objection taken in that case was that the mortgagor-plaintiff having known that the time fixed for payment had expired in January, 1936, must have applied, within three years from that date, under Article 181 of the Limitation Act for an extension of time ; and having failed to apply for an extension of time the application for a final decree was not sustainable. The learned Judge took the view that in so far as the payment is concerned, no period of limitation is provided and it will be open to the mortgagor-plaintiff to pay under Order 34, rule 8 of the Civil Procedure Code at any time before the final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed. In that case the mortgagee-defendant did not take advantage of the provision in rule 8, sub-rule (3) and apply for a final decree debarring the plaintiff from all right to redeem the property; and so long as the morgagee-defendant did not have recourse to such a provision, it was always open to the mortgagor-plaintiff to deposit the amount at any time and no application for extension was necessary; and since no application for extension of time fixed for payment was necessary, no question of any period of limitation would arise. What was contended in that decision was not that an application by the mortgagor-plaintiff for a final decree was necessary but an application for extension of the time fixed for payment, which application was found to be not necessary in view of the language of Order 34, rule 8. In the present case however the amount has been paid within the time provided for in the preliminary decree and the mortgagor-plaintiff's right to apply for a final decree therefore arises on such payment and such an application is specifically provided for under Rule 8, the application being one for a final decree ordering the defendant to deliver up the documents referred to in the preliminary decree and if necessary of re-transfer the property and also to put the mortgagor-plaintiff in possession. The cause of action for an application arises on payment and the period of limitation provided for such an application must be held to be governed by Article 181 of the Limitation Act, which will be three years from the date of the deposit Here the application was filed long after the date of the deposit and as such it is barred by limitation The principle of the decision above referred to is not applicable to the facts of the present case and the lower Courts have wrongly applied that decision to the present case. The lower Courts have erred in holding that the plaintiff's application for a final decree is not barred by limitation.

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* S.A. No. 2092 of 1953. 18th July, 1956.

[1] (1945) 2 M.L.J. 239.

The result is the appeal is allowed and the plaintiff's application will stand dismissed. In the circumstances of the case, however, there will be no order as to costs throughout.

(Leave to appeal is refused).

P.R.N. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

G. Krishna Iyer .. *Appellant**

v.

Sri Kailasanathar Koil Devasthanam, Tirunelveli Junction through Executive Officer Chidambaram Pillai .. *Respondent.*

Court-fees Act (*VII of* 1870), *section* 11—*Applicability—Mesne profits—Order for payment of fixed amount per month—Amount deposited monthly as directed by order of Appellate Court staying execution and withdrawn by decree-holder—Court-fee on amount withdrawn—If payable—Execution petition filed only as regards two final instalments—Liability for Court-fee.*

Facts:—Subsequent mesne profits were decreed at Rs. 100 per month in an appeal, and this amount was being deposited, according to the Appellate Court's order staying execution, by the judgment-debtor and the same was withdrawn by the decree-holder on paying Court-fee thereon as and when the amounts were withdrawn, because the Court demanded payment of Court-fee before ordering payment. A sum of Rs. 200 remained to be paid, with regard to which the decree-holder had to file an execution application, as the judgment-debtor refused to pay on some legal grounds. The question arose whether the decree-holder who paid Court-fee on the amounts periodically withdrawn was entitled to have the Court-fee paid included in the costs of execution

Held, that though, ordinarily, Court-fee can be recovered only when the decree is executed and the withdrawal of amounts from Court cannot be tantamount to execution of a decree, and no Court-fee would be payable, an execution petition having been filed for recovery of the sum of Rs. 200 remaining due, it must be held that Court-fee would have to be paid on the entire amount due until then as required by section 11 of the Court-Fees Act.

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* Appeal Against Appellate Order No. 99 of 1953. 2nd March, 1956.

Veeran Chetti v. *Veeran Chetti*, (1938) 1 M.L.J. 750 : I.L.R. (1938) Mad. 1050, relied on.

However, the difference between the Court-fee calculated at the higher rate at which Court-fee was paid at the time of the withdrawal of the monthly instalments, and the lower rate at which it would be payable on Court-fee being calculated on the aggregate amount would alone be allowed as costs.

Parasuram Byas v. *Atchutharama Rao*, (1942) 2 M.L.J. 673; distinguished.

Periannan Chetty v. *Nagappa Mudaliar*, (1906) 16 M.L.J. 543 : I.L.R. 30 Mad. 32; *Lakshmanan Chettiar* v. *Chidambaram Chettiar*, (1952) 65 M.L.J. 526; *The Province of Madras* v, *Ramaswami Chttiar*, (1953) 2 M.L.J. 710; *Nagalinga Nadar* v. *Amirtha Pandian*, (1955) 1 M.L.J. (N.R.C.) 53 and *Kunjammal* v. *Krishna Chettiar*, (1953) 2 M.L.J. 185, referred to.

Appeal against the decree of the District Court of Tirunelveli dated the 16th January, 1953 and passed in A.S. No. 104 of 1952 preferred against the order of the Court of the District Munsif of Tirunelveli dated the 18th April, 1952 and made in E.P. No. 473 of 1951 in O.S. No. 100 of 1947.

M. Natesan for Appellant.

The Assistant Government Pleader (*K. Veeraswami*) on behalf of the State.

T. M. Chinnyya Pillai for Respondent.

The Court made the following

ORDER.—In this appeal subsequent mesne profits was decreed at Rs. 100 per month. This amount was being deposited, according to the High Court's order staying execution, by the judgment debtor and it was being withdrawn, at the instance of the objection raised by the lower Court, on paying the requisite Court-fee thereon as and when the amounts were periodically withdrawn. Only a sum of Rs. 200 remained to be paid in regard to which an execution petition was filed, because the judgment-debtor refused to pay the same on some legal grounds. The contest before us now is whether the Court-fee paid on the amounts periodically withdrawn, should be included in the costs of execution. That such amounts can be withdrawn only on payment of Court-fee was the view taken by a Bench of this Court in *Parasuram Byas* v. *Achutarama Rao*[1], The Bench held that the amounts paid by way of Court-fee should be allowed as costs.

But recently in a decision of this Court in C.R.P. No. 1797 of 1952, *Nagalinga Nadar* v. *Amirtha Pandian*[2], decided by Mack, J., a contrary view has been held; *viz.*, that Court-fee need not be paid on these withdrawals from Court. The reasoning of Mack, J., was that such withdrawals would not be tantamount to execution of a decree. The learned Judge has also referred to the decision of Panchapakesa Ayyar, J., in *The Province of Madras* v. *Ramaswami Chettiar*[3], where a similar view was expressed, *viz.*, that Court-fee can be recovered only when the decree is executed.

The Bench decision of this Court can be clearly distinguished because therein the over-riding circumstance was that there was a provision in the decree itself directing payment of Court-fee and therefore the learned Judges held:

> "We must read the decree as a whole just as the executing Court, when faced with the necessity of deciding whether to issue a cheque to the plaintiff or not, is bound to do. And if one reads the decree as a whole, one is compelled to conclude that it is not until the plaintiff actually pays the additional Court-fee which is obligatory upon him according to the terms of the decree, that the full liability of the fourth defendant will be ascertained ".

But it has been held in several decisions that no direction to that effect is necessary and if the decree contains a direction to pay Court-fee it is not part of the decree. *Periannan Chetty* v. *Nagappa Mudaliar*[4], *Lakshmanan Chettiar* v. *Chidambaram Chettiar*[5], *Kunjammal* v. *Krishna Chettiar*[6]. If the matter had really stood thus, I would have followed the decision of Mack, J., and disposed of this matter. But thereis another complication *viz.*, that an execution petition having been filed for recovery of the sum of Rs. 200, Court-fee will have to be paid on the entire amount due until then, as required by section 11 of the Court-fees Act, *Veeran Chetti* v. *Veeran Chetty*[7].

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1. (1942) 2 M.L.J. 673.
2. (1955) 1 M.L.J. (N.R.C.) 53.
3. (1953) 2 M.L.J. 719.
4. (1906) 16 M.L.J. 543 : I.L.R. 30 Mad. 32.
5. (1933) 65 M.L.J. 526.
6. (1953) 2 M.L.J. 185.
7. (1938) 1 M.L.J. 750 : I.L.R. (1938) M. 1050.

The only advantage to which the appellant would be entitled to before me is that if Court-fee had been paid at higher rates at the time of the withdrawal of these monthly instalments, he will be liable to pay a lesser Court-fee if the same had been calculated on the aggregate amount. Therefore, post the matter again for further hearing.

On this matter being set down to-day and after further hearing the learned Advocates, it is found that the appellant would be entitled only to the difference between the Court-fee calculated at the higher rate at which the Court-fee was paid at the time of the withdrawal of these monthly instalments and the lower rate at which he would be entitled to pay on Court-fee being calculated on the aggregate amount. To that extent, they would stand allowed as costs. The respondent is found entitled to the issue of a certificate for the refund of the Court-fee to the extent allowed and the appellant will not be liable to the respondent for that amount. No order as to costs.

P.R.N. ——— *Refund of Court-fee allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE BASHEER AHMED SAYEED.

Viswanathan Chettiar .. *Petitioner**

Criminal Procedure Code (V of 1898), section 417 (4)—Special leave to appeal against order of acquittal—Delay in presentation of application for—If could be excused—Limitation Act (IX of 1908), sections 5 and 29 (2)—Applicability.

An application for special leave to appeal from an order of acquittal has to be filed within 60 days as provided under section 417 (4) of the Code of Criminal Procedure. To such an application section 5 of the Limitation Act is applicable and any delay in filing the special leave application could be excused if the applicant satisfies the Court that there was sufficient cause for the delay. Section 29 (2) of the Limitation Act comes into operation only when special law prescribes a period different from the period prescribed by the First Schedule to the Limitation Act. For special leave to appeal against acquittal the First Schedule to the Limitation Act does not prescribe any period at all and therefore there is no such difference between the period prescribed by the Law of Limitation and the Criminal Procedure Code.

Appeal sought to be preferred against the judgment of the Court of the Second Class Magistrate I, Tiruchirapalli, dated 15th February, 1956 and passed in C.C. No. 2588 of 1955.

A. S. Sivakaminathan for Petitioner.

The Court made the following

ORDER.—The point that arises for consideration here is whether the application for special leave to appeal from the order of acquittal for which a period of 60 days has been prescribed under section 417 (4) of the Criminal Procedure Code, excludes the application of section 5 of the Limitation Act, if there is delay in filing such an application within the period of 60 days. The office has pointed out in its note that section 29 (2) of the Limitation Act, would apply to the case and therefore section 5 would not be available to the complainant when he is out of time. But section 29 (2) comes into operation only when the special law prescribes a period different from the period prescribed by the First Schedule to the Limitation Act. In this case for a special leave against acquittal the schedule to the Limitation Act does not prescribe any period at all. Such being the case only where there is diffrence between the period prescribed by this schedule and the period prescribed by the special law would section 29 (2) be applicable. So far as the present case is concerned there is no such difference between the period prescribed by the Law of Limitation and the Criminal Procedure Code. For the first time it appears that under section 417(4) a period of 60 days has been prescribed for filing an application for special leave against acquittal.. Section 1, sub-section (2) of the Criminal Procedure Code makes all laws applicable to the Criminal Procedure Code including the Law of Limitation and nothing could prevent the appellant from taking advantage of section 5 of the Limitation Act.

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*S.R. Nos. 21577, 21578 and 24834 of 1956. 28th September, 1956.
(Cr. Appeal No. of 1956.)

The question then is whether the complainant has satisfied that there was sufficient cause for the delay in filing the special leave application. It transpires in this case that there was just a delay of one day after the re-opening of the Court before which the application should have been filed. Ordinarily one day's delay is always excused and in this case I am satisfied there is sufficient cause shown for the delay. So this delay will be excused.

Post the appeal for admission.

R.M. ——— *Delay excused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Kadan Kunhikannan .. *Accused.**

Criminal Procedure Code (*V of* 1898), *section* 244—*Scope—Plea of not guilty at the commencement of the enquiry—Admission of guilt when the accused was heard under section* 244—*Conviction.*

It cannot be said that where an accused has denied the offence when he was first questioned, he cannot plead guilty.

Under section 244, Criminal Procedure Code, if the accused does not admit the guilt, in the first instonce, after the witnesses for the prosecution are examined, the accused must be heard and if he admits his guilt then there is no reason why he should not be convicted, especially when he has not cross-examined the prosecution witnesses at all.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate (Judicial), Malabar at Kozhikode in his letter, dated 13th October, 1955, together with a copy of the order dated 13th October, 1955 and made in Crl. R.P. No. 21 of 1955.

C. K. Viswanatha Ayyar for the Accused.

The Public Prosecutor (*P. S. Kailasam*) for the State.

The Court made the following :—

ORDER :—This is a reference by the District Magistrate of Malabar, to set aside the conviction of the accused in S.T. No. 218 of 1955, on the file of the Honorary Special First Class Magistrate, Cannanore. The accused was prosecuted by the District Board for encroachment on the District Board property at the second furlong on Alavil to Azhikkode road. He is said to have put up a compound wall enclosing certain space belonging to the District Board. He was asked to remove the same by a notice Exhibit P-1. He did not remove it. Thereafter the District Board authorised the prosecution of the accused and the complaint was filed. Several adjournments were taken by the accused and on the last hearing date two witnesses were examined, P.W. 1 the Road Inspector, Highways, and P.W. 2, the Revenue Inspector, District Board. Both of them speak to the fact that the accused had encroached upon the District Board property and in spite of the notice he has not removed it. These witnesses were not cross-examined at all and the accused when questioned admitted that it was an encroachment, but as the District Board demanded a sum of Rs. 45, he did not pay that sum as he was till then paying only Rs. 3 per year and the amount of Rs. 9 for three years was due. On this he was convicted.

It is true that this being a summons case at the commencement of the enquiry he denied that he was guilty. Subsequently he filed a written statement alleging that this plot of land was given to him on pattom lease at the rate of Rs. 3 per year. He says that it is the Revenue Department that granted him that lease and that his continuous possession was recognised by the Revenue Department. Though in the written statement he stated so, when evidence was let in not one of the witnesses was cross-examined and the final answer to the question which is asked under section 244, Criminal Procedure Code, was that it was an encroachment. The Honorary First Class Magistrate was certainly justified on the evidence and on the statement made by the accused in coming to the conclusion that the accused was guilty of the encroachment and so the conviction is correct.

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*Cr.R.C. No. 826 of 1955. 3rd February, 1956.
(C. Ref. No. 25 of 1955.)

The District Magistrate seems to think that as the accused had denied the offence when he was first questioned he cannot plead guilty. This he says is opposed to section 244 Criminal Procedure Code. Section 244 itself lays down that if the accused does not admit the guilt in the first instance, the Magistrate shall proceed to hear the complainant and take all such evidence as may be produced in support of the prosecution and also hear the accused and take all such evidence as he produced in his evidence. Under this section therefore after the witnesses for the prosecution are examined, he must hear the accused and if the accused admits his guilt, I do not see any reason why the Court cannot accept that admission, and particularly so in this case when the witnesses are not cross-examined at all. In such a case the Court is certainly justified in convicting the accused. The view propounded by the District Magistrate in this reference is not justified, either on the provisions of the Code or on any decision of this Court.

The conviction and sentence of the accused are confirmed. The reference is not accepted.

K.S. ——— *Reference not accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Namasi Vanniar .. *Petitioner.*[*]

Madras Prohibition Act (X of 1937)—Contraband articles found in a house—Presumption as to possession.

In a house kept by the father and the adult son there is no presumption that the contraband articles found in the house should necessarily be in the possession of the father.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate (Judicial), Tanjore at Kumbakonam in C.A. No. 108 of 1955 (C.C. No. 76 of 1955 on the file of the Court of the Additional Sub-Magistrate, Kumbakonam).

M. Srinivasagopalan for Petitioner.

V. V. Radhakrishnan for Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—The petitioner in this case has been convicted for being in possession of wash and arrack and materials to manufacture illicit arrack. There is no doubt that at the time of the search of the house only accused 3 and 4 the woman folk were present in the house. Accused 3 is the wife of the petitioner and accused 4 is the daughter-in-law. Accused 1 (the petitioner) and accused 2 were absent. The petitioner is said to be the head of the family. The fact that accused 2 is married shows that he is an adult member of the family. That these articles were recovered from the house in question is established beyond doubt by the evidence of the police officer. But the question is, can it be said that the father alone was in exclusive possession of these things ? In a house kept by the father and an adult son, there is no presumption that the contraband articles found in the house should necessarily be in the possession of the father. They may as well be in the possession of the son or they may be in the possession of both. The evidence does not establish beyond doubt that the petitioner, the father, was in exclusive possession of the contraband articles.

In the result the conviction and sentence are set aside and the petitioner is acquitted.

V.S. ——— *Petition allowed.*

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[*] Crl.R.C. No. 966 of 1955. (Crl.R.P. No. 918 of 1955). 26th July, 1956.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

L. M. Muhammad Abdul Munaf Rowther *alias* Vellayappa .. *Appellant**

v.

The Municipal Council, Coimbatore, by its Commissioner, Coimbatore .. *Respondents.*

Madras District Municipalities Act (V of 1920), *section* 69 (1) *and* (2)—*Applicability and scope of—Suit by Municipality for damages for breach of agreement to take on lease properties of the Municipality—Absence of contract in writing—If bar to suit.*

Sub-sections (1) and (2) of the Madras District Municipalities Act apply only to a suit to enforce a contract entered into with a Municipality. Where the suit is by the Municipality for damages for breach of an agreement to take on lease certain properties of the Municipality, the absence of a contract in writing as required by section 69 (1) of the Act, is no bar to the suit under section 69 (2).

Corporation of Madras v. *Kothandapani Naidu,* (1954) 2 M.L.J. 743 : I.L.R. (1955) Mad. 128 (F.B.), distinguished.

Appeal against the decrees of the Court of the Principal Subordinate Judge of Coimbatore in Appeal Suits Nos. 163 and 162 of 195, preferred against the decrees of the Court of the Principal District Munsif of Coimbatore in Original Suits Nos. 537 of 1948 and 3 of 1949, respectively.

V. C. Veeraraghavan for Appellant.

C. A. Vaidialingam and *P. S. Kailasam* for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals arise out of two suits, O.S. No. 3 of 1949 instituted by the plaintiff-appellant, in Second Appeal No. 2373 of 1952, against the Municipal Council, Coimbatore, the other suit being O.S. No. 537 of 1948 instituted by the Municipal Council, Coimbatore, against the appellant. Thus in the two Second Appeals, the appellant is the same individual.

The appellant's suit was for recovery of a sum of Rs. 1524-12-0 being the amount paid in respect of an auction of the lease of palmyrah and cocoanut trees which he bid for at an auction held on the 8th of February, 1946. The suit of the municipality was for the recovery of a sum of Rs. 672-4-0 being the loss on re-sale, after adjusting the deposit paid in respect of the auction relating to the trees and also in respect of the auction of a sheep slaughter-house.

The Courts below in a common judgment decreed the suit of the municipality and dismissed the plaintiff's action.

The appellant was declared to be the highest bidder for a sum of Rs. 2,099 per year and the appellant wrote to the municipality under Exhibit A-3, dated 14th February, 1946, praying that he may be permitted to deposit one fourth of the amount of Rs. 2,099 amounting to Rs. 524-12-0 and offering to pay the balance in eleven monthly instalments and the one-fourth amount paid might be held as deposit. The Commissioner placed the matter before the Council at its meeting on the 21st of February, 1946, the subjects that were placed for decision of the Council being the highest bid of the appellant of Rs. 2,099 per year for three years, and the Commissioner recommending the lease for three years at the same rate, on the basis of the letter, Exhibit A-3 of the appellant requesting for permission to pay the balance of the three-fourth amount in monthly instalments. The recommendation of the Commissioner on that was that the appellant may be allowed to pay at the rate of Rs. 500 per mensem from 1st April, 1946. The Council approved the recommendation of the Commissioner. But thereafter from the subsequent correspondence it will be seen that the appellant had been trying to go behind the agreement, mainly on the ground that some of the cocoanut trees which were expected to belong to the municipality, were in fact, claimed by third parties and that he was under the impression that a larger number of trees was being auctioned, and also on the ground that permission to tap toddy was not granted. In the circumstances the municipality was obliged to have a re-auction and it is in respect of the loss caused on the re-auction that the other suit, O.S. No. 537 of 1948 has been filed by the municipality.

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*Second Appeal Nos. 2251 and 2373 of 1952. 15th February, 1956.

The agreement is sought to be avoided on the ground of mistake, but as found by the Courts below, this objection as regards the number of trees was not raised till at a late stage and it looked as if the appellant was trying to go behind the whole transaction on some pretext or other, and, in the circumstances, the view taken by the lower Courts that the breach of agreement was on the part of the appellant has to be accepted. The appellant refused to execute the lease deed and he has also stated that he did not take possession of the trees. Whatever may be the conduct of the appellant, it is clear that he did not wish to stand by the bargain of taking the lease of the trees on an annual rent of Rs. 2,099, for a period of three years. The natural consequence of such a refusal to perform his obligations will be that he will be liable for damages for breach of contract. Such damages the municipality has claimed and the lower Courts have found the municipality is entitled to it. With that finding I am unable to find any ground for interference.

Mr. Veeraraghavan, the learned counsel has raised a contention which was not raised in the Courts below but of which he has given notice to the other side and which he contends is a pure question of law. His argument is that under section 68, clause (2) of the Madras District Municipalities Act,

> "In respect of a contract whereof the value or amount exceeds one thousand rupees, the sanction of the council for the making thereof should be obtained before the same is made."

And, under section 69 (1)

> "Every contract made by, or on behalf of, a council whereof the value or amount exceeds one hundred rupees shall be in writing and, except in the case of contracts made under the provisions of sub-section (3) of section 68, shall be signed by two municipal councillors."

Sub-section (2) enacts

> "A contract executed or made otherwise than in conformity with the provisions of this section, of section 68, and of the rules referred to in section 68-A shall not be binding on the Municipal Council."

That there is no such contract as required by section 69 of the Act is evident, but it cannot be contended that in respect of the lease in question the sanction of the municipal council has not been obtained. Exhibit A-4 is evidence of such sanction and the fact remains that in respect of a counter offer made by the appellant as to the mode of payment of the rent, the council accepted that offer and the appellant stood by it and acted under it by paying two instalments of Rs. 100 as desired by him which could be seen from his letter Exhibit B-7, dated 12th November, 1946, to the municipality.

The only other question therefore is as to whether by reason of the absence of a contract not executed in the manner provided for under section 69 of the Act, the suit claim by the municipality becomes unsustainable. For this the learned counsel relied on a recent Full Bench decision of our High Court in *Corporation of Madras* v. *Kothandapani Naidu*[1], where it was held that a contract which is not in conformity with the requirements of sub-sections (1) and (2), of sections 68 and 69 of the Madras District Municipalities Act (V of 1920), does not bind, and is unenforceable by, either the municipality or the party contracting with the municipality. The suit by the municipality is not to enforce a contract entered into with the municipality but is a suit for damages for breach of an agreement to take on lease certain properties of the municipality. Such a suit is not covered by the decision of the Full Bench referred to. The suit being only for damages, the absence of a contract as required under section 69 of the Act is no bar for the claim of the municipality for damages.

The result is the appeals fail and are dismissed. In the circumstances of the case each party will bear their respective costs of the Second Appeals.

No leave.

P.R.N. *Appeals dismissed.*

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[1] (1954) 2 M.L.J. 743 : I.L.R. (1955) Mad. 128 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

A. M. Chinniah, Manager 786, Sangu Soap Works,
Kutumavadi Road, Arantangi .. *Petitioners.*

Factories Act (*LXIII of* 1948), *section* 2 (k), (l) *and* (m)—*Manufacturing process and worker—Employee—When deemed to be worker.*

In order to bring a premises within the definition of factory under the Factories Act, it should be established that twenty or more workers are working in aid of a manufacturing process carried on therein. In order to constitute a person a worker he should come within the definition of worker in section 2 (*l*) of the Act. Even though the definition of worker is very wide it will not include a person who is wholly unconnected with the manufacturing process carried on on the premises.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate, Tanjore, dated 13th September, 1955 and made in S.T.C. Nos. 36 and 37 of 1955, respectively.

V. S. Rangachari for Petitioners.

V. V. Radhakrishnan for The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.*—These are two connected Revisions arising from the convictions and sentences of the learned Sub-Divisional Magistrate, Tanjore, in S.T.C. Nos. 36 and 37 of 1955.

The facts of these cases have been fully set out in the judgment of the lower Court and need not be recapitulated because the short point for determination in these Revision Cases is whether the Sangu Soap Works, Kuttumavadi Road, Arantangi, is a factory within the meaning of Act (LXIII of 1948).

The Sangu Soap Works can be considered to be a factory only if under section 2 (*m*) (*ii*) of the Factories Act twenty or more workers are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on. The term "manufacturing process" has been defined in clause (*k*) of section 2. Sub-clauses (*iv*) and (*v*) of this clause are new. They did not occur in the old Act of 1934. Sub-clause (*i*) has also been made more comprehensive. The present definition is more comprehensive and wider in scope than that of the old Act.

As is plain from the definition the whole premises are a factory even though the manufacturing process is being carried on only in a part of the premises : In re. *Ramanathan*[1]. The words "manufacturing process" do not necessarily refer to something produced but to the business carried out. *Owner* v. *Cottingham Sanitary Steam Laundry Co., Ltd*[2]. Thus, a laundry carried on for the purpose of gain in which mechanical power is used for driving machines used in aid of the work of washing clothes is within the definition of a factory. The conversion of raw film into finished product comes within this definition of the section : In re. *Sarma*[3]. Putting ginned cotton into bales and having it pressed in the compound of the factory is a work incidental to or connected with manufacturing process within the meaning of the Act : *Local Government* v. *Nusarvanji*[4]. It will depend upon the circumstances of each case whether a particular business carried on comes within the definition of "manufacturing process" the different processes enumerated in the clauses being merely illustrative. To sum up, to constitute a manufacture there must be a transformation. Mere labour bestowed on an article even if the labour is applied through machinery, will not make it a manufacture, unless it has progressed so far that a transformation ensues, and the article becomes commercially known as another and different article from that as which it began its existence. Whatever is made by human labour, either directly or through the instrumentality of machinery (Abbott Law Dictionary).

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* Crl.R.C. Nos. 138 and 139 of 1956. 19th September, 1956.
(Crl.R.P. Nos. 126 and 127 of 1956).

[1] (1927) 51 M.L.J. 148 : I.L.R. 50 Mad. 34.

[2] (1910) 74 J.P. 219.

[3] A.I.R. 1953 Nag. 269.

[4] A.I.R. 1933 Nag. 283.

> " Something of corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill is required to satisfy the word ' manufactured ' ". *Per* Abbott, C.J., in *The King* v. *Wheeler*[1]. See also *Gibson* v. *Brand*[2].

Having considered the definition of " manufacturing process " set out in clause (*k*) of section 2 we come to the definition of a " worker " which is defined in clause (1), as meaning " a person employed, directly or through any agency whether for wages or not, in any manufacturing process " or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process. In other words the workers under this definition fall under three groups *viz*., persons employed directly or through any agency whether for wages or not (*a*) in any manufacturing process or (*b*) in cleaning any part of the machinery or premises used for manufacturing process or (*c*) in any other kind of work incidental to or connected, with the manufacturing process or the subject of such process: *Ramdit* v. *Emperor*[3]. See also *Emperor* v. *Ganpat*[4]. (For commentaries on " manufacturing process and works, *see* Vol. I of Encyclopaedia of Labour Laws and Industrial Legislation (pages, 12 and 14): A.N. Ayyar and T. A. Ramachandran—Factories Act, page 3 and following R. Mathurbutham—1. The Indian Factories and Labour Manual (M.L.J.) pages 28 and 29 : Bakshi and Mitra—The Factories Act, page 9 : Patwari—The Factories Act, page 46).

In this case the requisite number of twenty workers could have been made up only if (*a*) one Subbiah Asari who was found working as a carpenter and preparing the packing cases and (*b*) a boy Alagirisami who was found holding a paint tin, were included as workers. Otherwise the requisite number of workers would only be 18. In regard to Subbiah Asari, he may be included as a worker for the purpose of coming to the conclusion whether the Sangu Soap Works is a factory as defined in clause (*m*) of section 2, because he might legitimately be considered to be engaged *in a kind of work incidental to or connected with the subject of the manufacturing process*, viz., packaging of soaps for being sent out for sales : *Kadar Moideen* v. *The State*[5]. The fact that he might have been a causal labourer would make no difference because as pointed in *State of Bombay* v. *A. K. Thamboli*[6], to enable a person to be a worker, it may be that he may receive wages upon the basis of time work or it may be that he may receive remuneration upon the basis of piece work or may even be an apprentice or merely an honorary worker. The expression "worker" has a very wide import and would take in all these persons : Illustrative cases are *Local Government* v. *Nusarwanji*[7], *Prag Narayanan* v. *Crown*[8], *Legal Remembrancer Bengal* v. *Andrews*[9], *Provincial Government, C. P. and Berar* v. *Robinson*[10] *Manager Gemini Studios* v. *The State*[11].

I am unable however to agree that Alagirisami, the boy found holding a tin containing paint would come within the definition of a " Worker " and make up the requisite number 20. This boy was found holding a tin of paint does not mean that he was there for the purpose of ornamentation of the packing for transport which would come within the definition of " manufacturing process " because he was found standing outside apparently to paint the sign-board which would certainly not be a case of doing a kind of work incidential to or connected with the manufacturing process or the subject of the manufacturing process.

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1. (1819) 2 B. and Ald. 345 at 349: 106 E.R. 392.
2. (1842) 4 M. and G. 179 : 134 E.R. 74.
3. A.I.R. 1934 Cal. 546.
4. (1930) 32 Bom.L.R. 329.
5. (1952) 4 F.J.R. 131.
6. (1955) 2 L.L.J. 182.
7. A.I.R. 1933 Nag. 283.
8. A.I.R. 1928 Lah. 78.
9. A.I.R. 1931 Cal. 639.
10. I.L.R. (1947) Nag. 43 : A.I.R. 1947 Nag. 83.
11. (1954) 4 F.J.R. 329.

In the result, this Sangu Soap Works will not fall within the definition of a "Factory" and the convictions rested on that foot cannot be sustained. The convictions and sentences are set aside and the Revisions are allowed. The fine amounts, if collected, will be refunded.

R.M. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

P. S. Ramaswami Nadar .. *Petitioner**

v.

R. Viswanathan and another .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 200 and 203—Dismissal of a complaint—Procedure to be adopted—Summary dismissal of a complaint without examining witnesses present in Court.

Under section 200 of the Code of Criminal Procedure, as amended, a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. Under the section as it originally stood it was enough if the Magistrate examined an applicant on oath. The section is mandatory and it is obligatory on the part of the Magistrate to examine not only the complainant but also the witnesses who are present in Court. The Magistrate should ask the complainant as soon as he is examined on oath whether any witnesses are present in Court and if no witnesses are present the same should be mentioned in the order itself. The Magistrate could apply section 203 only if after examining the complainant and the witnesses who are present in Court, he finds sufficient ground for not proceeding with the case. A dismissal of a complaint under section 203 of the Code without adopting the procedure under section 200 is not valid.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Seventh Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, dated 18th April, 1956 and made in C.C. No. 3971 of 1956.

C. A. Mohamad Ibrahim for Petitioner.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

B. T. Sundararajan and *L. V. Krishnaswami* for Respondents.

The Court made the following

ORDER.—This is a revision by the complainant against the order of the Seventh Presidency Magistrate in C.C. No. 3971 of 1956 on his file. A complaint was filed against two respondents herein for an offence under section 420 and section 420 read with section 109, Indian Penal Code. Under section 200 of the Criminal Procedure Code as amended, a Magistrate taking cognisance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. Then the provisos follow. But these provisos have no bearing on this case. Under section 203 which relates to the dismissal of the complaints, the Magistrate before whom a complaint is made or to whom it has been transferred may dismiss the complaint if, after considering the statement on oath (if any) of the complainant and the witnesses and result of the investigation or enquiry, if any, under section 202, there is in his judgment no sufficient ground for proceeding. The learned counsel who appeared for the petitioner herein contends that the provisions of sections 200 and 203 have not been complied with, that is that he was present with the witnesses at the time when he presented the complaint, that the witnesses were not examined on oath and that the substance of their examination has not been reduced to writing by the Magistrate. But he fairly concedes that he did not present the complaint himself before the lower Court and he stated that Mr. A. Nagarajan was the advocate who appeared for the complainant in the lower Court. Mr. A. Nagarajan is now present in Court and I asked him whether the witnesses were present when he presented the complaint. He says that among the witnesses mentioned in the complaint C.K. Ramachandran and P.S. Narayanan (Nos. 1 and 4) were present in Court. Being a statement by an advocate who presented the complaint, I accept his statement, and Mr. B.T. Sundararajan, appearing for the respondents, very fairly concedes that he cannot dispute the statement of Mr. A. Nagarajan. The result is that when the complaint was presented, there were two witnesses present along with the complainnant, and under section 200, the Magistrate shall examine the complainant and the witnesses present (if any) on oath. The section is mandatory, and it is therefore obligatory on the part of the Magistrate to examine not only the complainant, but also the witnesses who are present in Court. The Magistrates in future will do well in asking the complainant as soon as he is examined on oath whether any witnesses are present in Court, and if witnesses were present, it is his duty to examine them on oath; but if no witnesses are present, he will do well to mention in the order itself that no witnesses were present according to the statement of the complainant or the advocate who appeared in Court. There is no such reference in the present case and very probably the Magistrate has overlooked the provisions of section 200 as amended. According to the section as it originally stood, it is enough if the Magistrate examined the complainant on oath. Under the new section, it makes it incumbent on the Magistrate to examine the witnesses who were present in Court on oath, and he can apply section 203 only if after examining the complainant and witnesses who are present in Court, he finds a sufficient ground for not proceeding with the case. Since this procedure has not been followed the complainant has got a grievance. I do not wish to express any opinion either way on the merits of this case as it will embarass the lower Court. On account of the non-compliance of the provisions of sections 200 and 203 in not examining the witnesses who, according to the advocate who appeared in the lower Court, were present, I set aside this order of dismissal under section 203 and direct the complaint to be restored to file, and the case will be disposed of according to law. This complaint will be enquired into by some Magistrate other than the Magistrate who dismissed the complaint. The Chief Presidency Magistrate will effect the necessary transfer.

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* Cr.R.C. No. 557 of 1956. 17th July, 1956.
(Cr.R.P. No. 514 of 1956.)

R.M. ——— *Order set aside and Complaint restored.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

Sasivarna Thevar .. *Petitioner**

v.

Ponnu *alias* Mayandi Konar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *sections* 12-*B and* 7 (3) (a) (ii)—*Landlord having a garage on lease—If could evict a tenant from his own garage.*

Practice—Revision—Powers of Revisional Authority to interfere with questions of fact—Scope of.

Where a landlord is in occupation of a garage on lease for keeping his vehicles he cannot apply under section 7 (3) (*a*) (*ii*) of the Madras Buildings (Lease and Rent Control) Act for eviction of a tenant in the occupation of his own garage on the ground that he requires the same for keeping his vehicle.

A Judge or a Tribunal exercising revisional jurisdiction is not ordinarily competent to interfere with the findings of facts arrived at by the inferior Tribunal. The mere fact that an Appellate Authority interfered with findings of fact of the Controller without sufficient reason, cannot be a ground for interference by the Revisional Authority with the findings of fact by the Appellate Authority.

[Grounds of interference by the Revisional Authority re-stated.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Madurai, dated, 10th July, 1954 and made in C.R.P. No. 19 of 1954 (C.M.A. No. 149 of 1952, Sub-Court, Madurai, against M.B.P. No. 220 of 1952, Court of the Additional Rent Controller, Madurai.

T. S. Kuppuswamy Ayyar for Petitioner.

T. S. Vydyanatha Ayyar for Respondent.

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* R.C.P. No. 1324 of 1954. 14th September, 1956.

The Court delivered the following

JUDGMENT.—The petitioner seeks to revise the order passed by the learned District Judge of Madurai on an application made to him under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, to revise the order passed by the learned Subordinate Judge of Madurai on an appeal preferred to him under section 12 of the Act against an order passed by the Additional Rent Controller, Madurai.

This revision petition arises out of a petition filed by the petitioner before me under section 7 of the Act to evict the respondent from a motor garage. The main ground on which the petitioner sought eviction was that he required the premises for his own occupation. The main plea of the respondent was that the petitioner's car was being garaged in a shed belonging to one Kangani Peria Karuppa Thevar and therefore the petition for eviction was liable to be dismissed under section 7 (3) (*a*) (*ii*) as the petitioner was occupying a non-residential building for the same purpose, *i.e.*, for the purpose of keeping a vehicle. On an examination of the evidence adduced before him, the Additional Rent Controller came to the conclusion that the petitioner must have taken the shed referred to by the respondent on lease. Nevertheless he held, on an admittedly wrong view of the law, that the petitioner-landlord was entitled to evict the respondent. He accordingly directed the respondent to vacate the premises within two months from the date of his order. The tenant filed an appeal which was heard and disposed of by the learned Subordinate Judge of Madurai. He dismissed the appeal but not on the ground on which the Rent Controller dismissed the application but because he came to a conclusion contrary to that of the Rent Controller on the main question, *viz.*, whether the landlord was in occupation of a building, possession of which he was entitled to. He held that there was no evidence to prove that the petitioner had a lease of Door No. 135 belonging to Periakaruppa Thevar for parking his car, and as he required the suit premises for his own use, he was entitled to obtain possession from the respondent. The tenant thereupon filed a petition under section 12-B of the Act to the District Judge of Madurai. The learned District Judge allowed the revision petition, set aside the order of eviction and dismissed the landlord's petition. It is against this order of the learned District Judge that the above revision petition has been filed.

Mr. T. S. Kuppuswami Ayyar, learned counsel for the petitioner, contended that the learned District Judge exceeded his jurisdiction in setting aside the finding of fact arrived at by the appellate Tribunal, *i.e.*, the learned Subordinate Judge. Ordinarily, there is no doubt that a Judge or Tribunal exercising revisional jurisdiction is not competent to interfere with the finding of fact arrived at by an inferior Tribunal. The powers of a revisional Court have always been understood to be more restricted than the powers of an appellate Court. In a recent case C.R.P. No. 1420 of 1954 arising out of similar proceedings under the Rent Control Act, Rajagopala Ayyangar, J., laid down the circumstances in which a revisional authority would be entitled to interfere with findings of fact of a subordinate authority. The learned Judge said:

> "The only proper way of defining the relative jurisdiction of the appellate and revisional authorities constituted under the Madras Buildings (Lease and Rent Control) Act is to hold that while an appellate authority is entitled to examine every question of fact and law dealt with in, or arising out of, an order of the Rent Controller, a revisional authority, while undoubtedly can interfere with questions of law, where the Rent Control Act or any provision has been misconstrued, cannot normally interfere with findings of fact unless (*a*) there were no other materials on which such a finding could be based ; or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter, or (*c*) it is so perverse that no reasonable person could have reached that conclusion ; or (*d*) the finding had been reached by an erroneous understanding of the law applicable to the matter. To hold that a revisional authority could interfere with findings of fact of an appellate authority without regard to these limitations would be to convert a revision into a regular appeal and to obliterate the distinction between appeals and revisions which the Act has taken care to provide."

In my opinion, none of the four conditions which would justify interference by the revisional authority with a finding of fact of the subordinate authority enumerated by Rajagopala Ayyangar, J., is satisfied in this case. It cannot be said that there was no material whatever on which the appellate Court, that is the Subordinate Judge, could have arrived at his finding. Nor can it be said that the finding was reached on a consideration of irrelevant and inadmissible matter. I find it impossible to hold that the Subordinate Judge's finding is so preverse that no reasonable person could have reached that conclusion. It is not even contended that the finding has been reached by an erroneous understanding of the law applicable to the matter.

I shall now examine the order of the learned District Judge to discover the grounds on which he set aside the appellate Judge's finding of fact. In his view a Court of revision could interfere in a case like the present where the appellate authority has without sufficient reasons, and due to a misconstruction of the pleadings, reversed a finding of fact given by the learned Additional Rent Controller. I may at once say that mere absence of sufficient reason would not fall within any of the four heads enumerated by Rajagopala Ayyangar, J. As to a misconstruction of the pleadings, it must be established that the finding was entirely based on such a misconstruction.

At the end of paragraph 9 of his judgment the learned Judge, after referring to the findings of the Rent Controller and the learned Sudordinate Judge said :

> "Thus both the Rent Controller and appellate authority have expressed themselves very emphatically in favour of the respective conclusions reached by them on the same question of fact."

In paragraph 11 the learned District Judge has said that the appellate authority, *i.e.*, the Subordinate Judge, had committed a mistake of fact when he stated that even in the additional counter of the tenant he had not stated that door No. 135 had been taken on lease by the respondent. According to the learned District Judge a perusal of the additional counter does not support this observation. It is obvious what the learned Subordinate Judge meant when he stated "it is not stated in the additional counter-affidavit that the garage had been taken on lease *by the respondent*." In any event I am convinced that the ultimate decision of the learned Subordinate Judge was not influenced by this fact. Immediately after this comment on the alleged mistake committed by the learned Subordinate Judge the learned District Judge goes on to say in paragraph 13 :

> "I am afraid that the above misapprehension on the part of appellate authority has been responsible to a great extent for its finding on the said question of fact. Further the very strong finding which the learned Rent Controller gave on this question after inspectiug the premises nould not be lightly differed from and without reason being given. I therefore find in the circumstances that the finding of fact of the learned Rent Controller alone has to be accepted and not that of the appellate authority".

It is obvious that one of the grounds on which alone a revisional authority can interfere with a finding of fact has been set out by the learned District Judge. Learned counsel for the respondent was unable to draw my attention to any other part of the learned District Judge's judgment in which he has set out why he could legitimately interfere with the finding of fact arrived at by the appellate authority, *i.e.*, the learned Subordinate Judge.

I am clearly of the opinion that the learned District Judge exceeded the limits of his jurisdiction in setting aside the finding of fact arrived at by the learned Subordinate Judge. The Civil Revision Petition is therefore allowed and the order of the learned District Judge is set aside and that of the Subordinate Judge, the appellate authority is restored. The respondent will pay the costs of this petition to the petitioner. The respondent (tenant) will have time till the 31st December, 1956, for vacating the premises.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Pakkirisami Naidu *alias* Varadarajulu Naidu .. *Petitioner**

v.

The State of Madras through the Chief Secretary to Government, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 3 (1) (a) *and* (b) *and* (3)—*Construction and scope—Rules framed under section* 17 (2), *rule* 3—*Notice of vacancy under section* 2 (1)—*Conditions of validity—Absence of particulars—Effect—Notice sent beyond seven days—If invalid—Right of Accommodation Controller to treat as valid and act upon—Landlord requesting permission to occupy premises* bona fide—*Order of requisition not setting out consideration of request—If bad and liable to be quashed—Order of requisition—If offends Art.* 19 (1) (b) *of the Constitution.*

Before a notice of vacancy under section 3 (1) of the Madras Buildings (Lease and Rent Control) Act, 1949, could be said to conform to the requirements of section 3, sub-section (1), clauses (*a*) and (*b*), all the requirements of rule 3 of the rules framed under section 17 (2) of the Act have to be complied with, namely : (1) Details of the accommodation available together with particulars as regards the ground area, garden and out-houses, if any, appurtenant to the building; (2) if the building is not occupied by the landlord whether it is occupied by a single tenant or by more than one tenant ; (3) amenities available in regard to lighting, water, sanitation and the like ; (4) monthly rent paid by the tenant. A notice or communication in which these details are not set out cannot be regarded as a valid notice conforming to the provisions of section 3 (1) (*a*) or (*b*).

It cannot be said that a notice sent beyond the period of seven days prescribed by section 3 (1) is not a valid notice upon which the Accommodation Controller could act. The period of seven days is prescribed within which, without committing an offence, the landlord could furnish the information required. The mere fact that the period of seven days prescribed by section 3 (1) has expired, does not lead to the conclusion that the notice under section 3 (1) (*a*) ceases to be a valid notice under the section. The Accommodation Controller is justified in treating the notice as a valid notice and proceed on that basis. An order of the Accommodation Controller requisitioning premises under section 3 (3) of the Act for the occupation of a Government servant without acceding to the request of the landlord not to requisition the premises as he himself *bona fide* needed the same for his own accommodation, cannot be held to be bad and liable to be quashed by a writ of *mandamus* under Article 226 of the Constitution, merely on the ground that the Accommodation Controller has not, in his order, given any indication of his having considered the request of the landlord. The Controller under section 3 (3) is given a right to requisition premises for the use of a Government servant as one entitled to priority. Though, under section 3 (1) (*a*), proviso, of the Act, when the landlord has obtained an order of a Rent Controller that the building is required *bona fide* for his accommodation, the Accommodation Controller has no jurisdiction to direct a requisition, it does not follow that in cases not covered by the proviso, that officer is bound to consider the needs of the owner and postpone public requirements on that ground. That the conflicting or competing considerations of the requirement of the owner and the need of the Government servant to occupy the premises are not set out in the order is no ground for quashing the order. Under section 3 (3) the need for accommodation of public officials is the paramount consideration and that has been given priority, and the *bona fide* requirement of the landlord to occupy his own house has to be rejected.

Premavathi Ammal v. *State of Madras*, (1955) 1 M.L.J. 454, explained.

An order of the Rent Controller under section 3 (3) cannot be held to infringe or contravene the freedom guaranteed under Article 19 (1) (*f*) of the Constitution. The deprivation of a landlord of the right to hold property by the law granting to a tenant paying a reasonable rent a right to be in possession of the premises against the will of the landlord is not an infraction of Article 19 (1) (*f*) or an unreasonable restriction on the exercise of that right. The fact that it is a Government servant that comes to occupy the premises does not attract Article 19 (1) (*f*) at all.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleaded to issue a writ of *mandamus* directing the Respondents to forbear from allotting to any other person the premises No. 61, Gangathareeswarar Koil Street, Purasawalkam, Madras in pursuance of the order of the Accommodation Controller, dated 3rd May, 1955, in A. 4—5040 of 1955.

K. Arunachala Sastri for Petitioner.

The Special Government pleader (*V. V. Raghavan*) on behalf of the State.

The Court made the following

ORDER.—The question raised by this writ petition is as regards the proper construction of certain provisions of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949) and the validity of certain action taken by the Accommodation Controller in regard to the premises of the petitioner. The petitioner is the owner of two house Nos. 60 and 61, Gangathareeswarar Koil Street, Purasawalkam, Madras. House No. 60 has been occupied by an official of the Central Government and its only relevancy for the present proceedings is that it is not available for occupation by the petitioner. House No. 61 had been let out to tenants for the past several years. The last tenant, who occupied that property, died in 1955, and his heirs, who continued to remain in the premises for some time after the death of the tenant, vacated the premises on 14th April, 1955. On 20th April, 1955, the petitioner intimated the Accommodation Controller of the vacancy, but in this notice, which is purported to be one under section 3 (1) (*a*) of the Act the petitioner did not furnish the particulars which he was required to furnish under section 3 (1) (*b*) of the Act, a matter to which I shall refer in a little more detail later. The Accommodation Controller when he received this notice stated that it was not in proper form and directed the petitioner to submit a notice, which would conform to the rules. The petitioner did so and sent another notice on 27th April, 1955, which admittedly conformed to the requirements of the rules. In this he gave all the particulars, which a landlord, when giving notice under section 3 (1), had to furnish. In this communication, dated 20th April, 1955, the petitioner had stated that house No. 61 was required for his own occupation and that the Accommodation Controller might be pleased not to requisition the building. But notwithstanding the request contained in this communication, the Accommodation Controller who is the respondent here by his order, dated 3rd May, 1955, requisitioned the house bearing door No. 61 for the accommodation of an Officer of the Income-tax Department. The petitioner applied to the Secretary, Home Department for redress; but not having obtained it, he has approached this Court with this writ petition.

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*W.P. No. 413 of 1956. 10th September, 1956.

Learned counsel for the petitioner raised three contentions: The first was that his client's notice, dated 20th April, 1955, was substantially in compliance with the enactment and that as the Accommodation Controller had received this notice on 21st April, 1955, the ten days' time within which a requisition could take place under section 3 (3) of the Act expired by the end of the month and that the order, dated 3rd May, 1955, was out of time. As part of this argument he urged that the notice or the intimation, dated 27th April, 1955, in which the petitioner furnished the full particulars, which were demanded of him was despatched beyond the seven days' time mentioned in section 3 (1) and was not therefore a notice on which a requisition under section 3 (3) could be founded. The second contention was that the Accommodation Controller had not considered the *bona fide* requirement of the petitioner of the premises No. 61 before directing the requisition and that, as this material matter has not been considered by the Accommodation Controller or by the Government, the order should be set aside. Lastly, he contended that as the petitioner still continued to remain in possession of the property, any attempt on the part of the Government to enforce the requisition would offend the guarantee contained in Article 19 (1) (*f*) of the Constitution.

I shall consider these contentions in the order in which I have set them above. Section 3 (1) (*a*) enacts :

> "Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of the vacancy in writing to the officer authorized in that behalf by the State Government (hereinafter in this section referred to as the 'authorised officer").

Provided that this sub-section shall not apply to a building in respect of which the landlord has obtained an order for possession on any of the grounds specified in section 7, sub-section (3). Sub-clause (*b*) of this sub-section provides that every notice given uner clause (*a*) shall contain such particulars as may be prescribed. Section 15 requires every landlord to furnish to the Controller or any person authorised by him in that behalf, such particulars in respect of the building as may be prescribed by rules made under the Act; and under section 17 (2) the State Government is empowered by rules to provide for all matters expressly required or allowed by the Act to be prescribed. In accordance with these provisions, rules have been made and under the rules published in G.O. No. 3850 Development, dated 10th October, 1946, the particulars to be furnished under section 15 to the Controller or any person authorised by him in that behalf are set out, and rule 4 prescribes that a notice under section 3 (1) should contain the particulars prescribed in rule 3 ; the effect of which is that all the requirements of rule 3 have to be complied with before a notice could be said to conform to the requirements of section 3 (1) (*a*) and (*b*). Among the matters to be set out in the notice or communication by the landlord on a vacancy occurring are: (1) details of the accommodation available together with particulars as regards the ground area, garden and out-houses if any, appurtenant to the building ; (2) if the building is not occupied by the landlord, whether it is occupied by a single tenant or by more than one tenant ; (3) amenities available in regard to lighting, water, sanitation and the like ; (4) monthly rent paid by the tenant. There cannot be any controversy that these matters are essential to be known before the Accommodation Controller could make up his mind as to whether the residential house in question is or is not fit for being occupied by a Government servant, and it is also admitted that in the communication, dated 20th April, 1955, which the petitioner, addressed to the Accommodation Controller, these details were not set out. I cannot therefore, regard this notice, dated 20th April, 1955, as a notice conforming to the requirements of section 3 (1) (*a*) or (*b*). If this notice were any other way we have the fact that the petitioner did furnish these particulars on 27th April, 1955, in response to the requisition of the Accommodation Controller. Learned counsel did, as I have indicated, contend that as this notice was beyond the seven days' time prescribed by section 3 (1), it was not a notice upon which the Accommodation Controller could act. I do not see any force in this agrument at all. The period of seven days is prescribed within which, without committing an offence, the landlord could furnish the information. If he does not do so, it might be open to the authorities to prosecute the landlord. But merely because the period prescribed by section 3 (1) has expired, it does not mean that a notice purporting to be under section 3 (1) (*a*) ceases to be a valid notice under that section. In my opinion the Accommodation Controller was justified in treating the notice, dated 27th April, 1955, as a valid notice and proceeding on that basis.

The next question for consideration is whether the order of the Accommodation Controller requisitioning the premises is liable to be quashed, for the reason that he did not in his order give indications, that he has considered the request of the petitioner that the premises should not be requisitioned, as they were needed *bona fide* for his own accommodation. So far as the language of section 3 (3) is concerned, it gives a right to the Accommodation Controller to requisition premises for the use of a Government servant as one entitled to priority. Even if the request of the petitioner had been considered, still, if the officer was of the opinion that the building was required for the occupation of an officer of the Central Government, he was bound to order the requisition, and he was not entitled to conform to the wishes of the petitioner. It is no doubt true that under the proviso to section 3 (1) (*a*) when the landlord has obtained an order from a Rent Controller that the building is required *bona fide* for his own occupation, the Accommodation Controller has no jurisdiction to direct a requisition. But from this it does not follow that in cases not covered by the proviso the Accommodation Controller is bound to consider the needs of the owner and postpone public requirements on that ground. Learned counsel for the petitioner invited my attention to a decision of Rajagopalan, J., reported in *Premavathi Ammal* v. *State of Madras*[1]. No doubt, there are some observations in it, which appear to favour the contention put forward by the learned counsel for the petitioner ; but I do not read that decision as meaning that, unless the conflicting or competing considerations of the requirement of the owner and the need of the officer of the State or the Central Government to occupy the premises are set out in the order, the order is liable to be quashed. As I have said before, section 3 (3) lays down the need for accommodation of public officials as the paramount consideration in the matter of requisition. If, therefore, these have to be given that priority, it follows that the *bona fide* requirement of the landlord to occupy his own house has to be rejected. In this view I do not see any necessity to interfere with the order of the Rent Controller.

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[1] (1955) 1 M.L.J. 454.

The last point urged was that the order of the Rent Controller, which is sought to be quashed, was in contravention of the freedom guaranteed under Article 19 (1) (*f*). Frankly speaking I am unable to appreciate the point at all. It is not suggested that the deprivation of the landlord of the right to hold the property, by the law granting to a tenant paying a reasonable rent a right to be in possession of the premises against the will of the landlord is an infraction of Article 19 (1) (*f*) of the Constitution or an unreasonable restriction on the exercise of that right. If this were so, the act that it is a Government servant that comes to occupy the house does not in my opinion attract Article 19 (1) (*f*) at all.

The writ petition fails and is dismissed. No order as to costs.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Balarama Iyer and another .. *Appellants**

v.

Meganatha Mudaliar .. *Respondent.*

Madras Hereditary Village Offices Act (III of 1895), section 5—Scope—Blacksmith service inam land—Sale in Court auction of interest in—Validity—Public policy.

A sale in Court auction of an interest in a blacksmith service inam land is void *ab initio* under section 5 of the Madras Hereditary Village Offices Act, 1895. Such an alienation is against public policy and does not confer any rights on the purchaser.

Anajneyulu v. *Sri Venugopala Rice Mill, Ltd.*, (1922) 42 M.L.J. 477: I.L.R. 45 Mad. 620 (F.B.), followed.

Venkanna v. *Chinna Appalaswami*, (1924) 48 M.L.J. 217 and *Vaidyanatha Ayyar* v. *Yogambal Ammal*, (1926) 51 M.L.J. 695; *Gokavarappu Swami* v. *Satheyya*, (1935) 70 M.L.J. 266 : I.L.R. 59 Mad. 354 (F.B.), referred to.

Appeal against the Decree of the District Court of Chingleput in Appeal Suit No. 402 of 1951 preferred against the Decree of Court of the District Munsif of Kancheepuram in original Suit No. 376 of 1950.

S. Viswanathan for *M.S. Venkatarama Ayyar* for Appellants.

T. Venkatadri for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants. The suit out of which this appeal arises was for a declaration of the plaintiff's melwaram right in a portion of the land bearing S. No. 83, Nanja, 48 cents in extent in Vengudi village and for recovery of Rs. 75 being the melwaram share of the produce due for faslis 1357, 1358 and 1359. The defendants are the owners of kudiwaram interest in the land bearing No. 83, Nanja, 95 cents in extent in Vengudi village. The case of the plaintiff is that the melwaram right in the said land was originally owned by two persons named Balasubramania Asari and Ponnusami Asari, that Balasubramania Asari's half share was sold in Court-auction in S.C. No. 54 of 1937, Sub-Court, Chingleput, and purchased by the plaintiff, that he has taken delivery of possession of the said half share and that thereiore he is entitled to the melwaram right from the defendants. The defendants contended that the melwaram right in the land, which is a blacksmith service inam was not liable to be sold either *inter-parties* or in execution of a decree of a Court and such a sale is void. The trial Court upheld the contention and dismissed the action. In appeal the learned District Judge took a different view. The short point for determination is whether the sale in Court-auction of an interest in a blacksmith service inam is valid to entitle the purchaser to the limited rights in the property. The trial Court followed the rulings in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1] and also in *Gokavarapu Swami* v. *Satheyya*[2], and held that a service tenure is not subject to attachment in execution of a decree, as the sale of such interest in the lands is opposed to public policy. The learned District Judge, however, relied on the decision in *Venkanna* v. *Chinna Appalaswami*[3], and took the view that such a sale would be good till the lifetime of the service-holder and that until the Government interferes and resumes the inams the purchaser of the melwaram right could enforce his rights to recover the melwaram. There is apparently a confusion and for the later position he relied on the decision in *Vaidyanatha Ayyar* v. *Yogambal Ammal*[4], which related to a personal inam. The Full Bench ruling in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1], places beyond doubt that such a sale is void *ab initio* and this is the language of section 5 of the Madras Hereditary Village Offices Act III of 1895, which provides :

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* Second Appeal No. 1172 of 1953. 9th April, 1956.

> "The emoluments of village offices, whether such offices be or be not hereditary, and in the scheduled districts as defined in the Scheduled Districts Act, 1874, all such emoluments and other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of orders shall not be liable to be transferred or encumbered in any manner whatsoever and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof".

That such an alienation is against public policy is also held by the learned Judges in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1], whether it would be competent for the holder of a service inam to lease the property and whether such a lease would be valid till his lifetime is a matter which does not arise in this appeal and there is some variance in the views of this Court, which however does not require to be examined for the purpose of this appeal, which raises only the question as to the validity of a sale of a service inam in execution of a decree of Court. The lower Court rightly followed the decision in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1], and dismissed the suit. The result is the appeal is allowed and the suit stands dismissed with costs.

P.R.N. *Appeal allowed. Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

I.S. Vasudeva Bhat and another .. *Petitioners**.

Madras Shops and Establishments Act (XXXVI of 1947), sections 41 and 45—Prosecution of an employer for failure to reinstate a dismissed employee as per Commissioner's order—Question as to legality of dismissal—If can be gone into.

Section 41 of the Madras Shops and Establishments Act provides the procedure to be adopted by the employer before he dismisses an employee and a right of appeal to the prescribed authority and under sub-section (3) of the section the decision of the Appellate Authority is held to be final and binding on both the employer and employee. But the section does not say that the decision of the authority cannot be questioned in a Court of law.

Hence although under the Act the decision of the Commissioner of Labour is said to be final, still in a prosecution for an alleged disobedience of the provisions of a particular section, it is open to the Court trying the accused to go into the question whether the act of the accused constitutes an offence or not. The Court is not bound by the mere finality of the decision given by the particular authority under the section.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate, South Kanara, Mangalore, dated 15th December, 1955 and made in Criminal Appeal No. 125 of 1955 preferred against the order of the Court of the Judicial Sub-Magistrate of Mangalore, dated 30th September, 1955 and made in C.C. No. 889 of 1955.

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[1] (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620 (F.B.).

[2] (1935) 70 M.L.J. 266 : I.L.R. 59 Mad. 354.

[3] (1924) 48 M.L.J. 217.

[4] (1926) 51 M.L.J. 695.

* Crl.R.C. No. 110 of 1956.
(Crl.R.P. No. 98 of 1956.)

21st September, 1956

K. S. Hedge and *M. Gopalakrishna Shetty* for Petitioners.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—This is a revision against the conviction of the petitioners for an offence under section 41 (1) read with section 45 of the Madras Shops and Establishments Act XXXVI of 1947. The petitioners are the Joint Managers of the Joint Booking Office at Kodailbail. They dismissed an employee by name Venkatesa Bhatt, who was examined as P.W. 2 in the case by an order, dated 16th June, 1953, Exhibit P-2. This was communicated to the Commissioner for Workmen's Compensation. P.W. 2 appealed to the Commissioner against the order of these employers and the Additional Commissioner after holding an enquiry held by his order, dated 25th September, 1954, that the dismissal of P.W. 2 was not valid and also communicated the same to the office of the accused. Notwithstanding the decision of the Commissioner the accused did not reinstate P.W. 2 and this prosecution is launched therefore for not complying with the order of the Commissioner. The Sub-Magistrate, without going into the question as to whether the dismissal of P.W. 2 was justified or not, held that the decision of the Commissioner according to the provisions of clause (3) of section 41 is final and therefore the criminal Court cannot go into the question again and found the petitioners guilty of the offences charged. The appellate Court acquitted the petitioners of the offence under section 41 (3), but confirmed the conviction under section 41 (1).

The main question in this revision is whether the Court can refuse to go into the question about the legality or illegality of the dismissal of P.W. 2. Section 41 of the Act provides the procedure to be adopted by the employer before he dismisses an employee, that is under clause (1). Under clause (2) a right of appeal is given to the authority prescribed under the Act, that is the Commissioner of Labour. Under clause (3) the decision of the appellate authority shall be final and binding on both the employer and the person employed. It is the provision of this clause (3) which has given trouble in this case. The question is, whether on account of this clause, the Court can refuse to go into that question. In connection with this, it is necessary to compare the provisions of section 51 of the same Act. Section 51 is as follows :—

> "If any question arises whether all or any of the provisions of this Act apply to an establishment or to a person employed therein or whether section 50 applies to any case or not, it shall be decided by the Commissioner of Labour and his decision thereon shall be final and not be liable to be questioned *in any Court of law* ".

Under section 51 therefore the decision given by the Commisioner of Labour cannot be questioned in a Court of law. There is no such prohibition in clause (3) of section 41. It merely lays down that the decision is final. It does not say that such a decision shall not be questioned in a Court of law. Where in the same Act the decisions under two sections are final with respect to the matters mentioned therein and in one of the sections it is specifically stated that the decision cannot be questioned in a Court of law and in the other section there is no such prohibition, the ordinary and legitimate inference is that where there is no such prohibition in a section the Court of law can question the legality, although the decision may be final as between the parties. There are other Acts in which such decisions of statutory bodies are made final and the question as to whether the finality of the decision affects the jurisdiction of the Courts to go into the legality of it has been considered in several decisions of this Court.

In *Ramaswami Iyengar* v. *The Sivakasi Municipality*[1], a Bench of this Court consisting of Pandrang Row and Venkataramana Rao, JJ., was considering a prosecution under the District Municipalities Act for non-payment of profession-tax. The provisions of the District Municipalities Act laid down that under certain conditions where an assessment has not been objected to or on objection the assessment has been confirmed, it is treated as final, and yet when a prosecution has been launched for non-payment of the Profession tax, it was held by the Bench that

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[1] (1936) M.W.N. 221.

> "the said finality is only for the purpose of the Act and it has been held that the said finality would not prevent a person from impeaching the legality or validity of the assessment in a Civil Court. So far as the right of the municipality to levy any tax is concerned, they must strictly conform to the provisions of the Act. If they do not do so, they have no right to enforce the tax. In fact section 354 says that a charge can be validly imposed if the provisions of the Act are substantially complied with. If not, there is no jurisdiction to levy it. The imposition of a tax on a person not taxable under the Act would be a substantial disregard of the provisions of the Act and in a suit for refund of the tax it is open to a person to prove that he is not taxable under the Act. We do not see why a different principle should apply in the case of a criminal prosecution and how a person can be convicted of a criminal offence for non-payment of a sum which he is not legally liable to pay".

The Bench followed the decision of Krishnan, J., in *Smith*, In re.,[1] which decision was approved of by Devadoss, J., in *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Ayyangar*[2].

The decision in *Ramaswami Iyengar* v. *The Sivakasi Municipality*[3], was followed by Govinda Menon, J., in *Narasingamuthu Chettiar*, In re.[4] That was a case under the General Sales Tax Act. According to the provisions of clause (4) of section 11 of the Act every order pending appeal under that section shall be final. In that case the assessee was prosecuted for non-payment of tax and Govinda Menon, J., after referring to the decision in *Ramaswami Iyengar* v. *The Sivakasi Municipality*[3], and to another decision in *Public Prosecutor* v. *Chakka Kondappa*[5], a judgment of Yahya Ali, J., held that the prosecution must establish a *prima facie* case of the liability to pay tax.

It is therefore clear from the above decisions that although under the Act the decision of a particular authority may be said to be final, still when a prosecution is launched for the disobedience of the provisions of the section, it is open to the criminal Court to go into the question whether the act of the accused is an offence or not. It is not bound by the mere finality of the decision given by the particular authority mentioned in the section. Both the lower Courts have therefore erred in not permitting the accused to go into that question and the conviction therefore has got to be set aside.

The conviction and sentence of the petitioners for the offence under section 41 (1) are therefore set aside. The petitioners are acquitted and the fines, if paid, will be refunded. The dismissed employee will have his remedies in a civil Court.

R.M. *Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Kelloth Ibrahim Haji and others .. *Petitioners.**

Civil Procedure Code (V of 1908), Order 1, rule 10 (2)—Discretion of Court—Addition of parties at instance of defendant—Order for, when to be made—Considerations—"Questions involved in the suit"—Interpretation—Order 8-A—Applicability—Third party procedure—Resort to—When to be made—Application to Court—Necessity.

Order 1, rule 10 (2), Civil Procedure Code, confers upon the Court a wide discretion to meet every case of defect of parties, subject to two limitations; namely, (1) the Court has no power to join a person as a party, if he could not have been impleaded originally under rule 1, or rule 3, of Order 1, Civil Procedure Code ; and (2) that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all points involved in the suit.

This discretion has to be exercised in a reasonable manner so as not to cause inconvenience or embarrassment. The Court must not load the record with parties who are shown to have only an indirect or remote interest and the Court should bear in mind that the trial of the suit is not embarrassed by the simultaneous investigation of totally different unconnected controversies. "Questions involved in the suit" do not mean all claims which may possibly be put forward by anybody.

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[1] (1923) 45 M.L.J. 731.

[2] (1927) 53 M.L.J. 566 : I.L.R. 51 Mad. 876 at 884.

[3] (1936) M.W.N. 221.

[4] (1948) 2 M.L.J. 93.

[5] (1947) 1 M.L.J. 317.

* C.R.P. No. 1178 of 1956. 13th September, 1956.

Where the persons sought to be impleaded have no subsisting right or interest in the subject-matter of the suit and they are sought to be impleaded by the defendants only for the purpose of getting their evidence, it would not be proper to make them parties on the mere ground that the defendants would be driven to the necessity of filing a separate suit against those parties.

Vaithilinga v. *Sadasiva*, A.I.R. 1926 Mad. 836 ; *Palanisamy Chettiar* v. *Komara Chettiar*, (1949) 2 M.L.J. 568 ; *Sitaramayya* v. *Ramappaya*, (1916) 5 L.W. 207 and *Vithoba* v. *Secretary of State*, A.I.R. 1925 Nag. 373, followed.

Naraini Kuar v. *Durjan Kuar*, (1880) I.L.R. 2 All. 738 ; *Kalian Rai* v. *Ram Ratan*, (1896) I.L.R. 18 All. 306 ; *Jayagobind* v. *Gouree*, 7 W.R. 201 ; *Veerabadrappa* v. *Sekabai*, I.L.R. (1939) Bom. 232 ; *Mahammad* v. *Nichol*, (1878) I.L.R. 4 Cal. 355 ; *Gosta* v. *Sur*, I.L.R. (1948) Cal. 656 and *Moser* v. *Marsdan*, L.R. (1892) 1 Ch. 487, referred to.

The Court can consider the third party procedure only on an application filed in terms of Order 8-A, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to review the order of the Court of the District Munsif of Badagara, dated 13th July, 1956 and made in R.I.A. No. 517 of 1956 in O.S. No. 339 of 1955.

C. S. Swaminathan for Petitioner.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition sought to be preferred against the order made by the learned District Munsif of Badagara in R.I.A. No. 517 of 1956 in O.S. No. 339 of 1955.

The facts are : The suit is one for partition and separate possession of the plaintiff's share in the properties shown in the plaint. The properties, it is alleged, originally belonged to one Moideenkutti, who died about 20 years ago. Plaintiff alleges that he has obtained a share in the property by virtue of an assignment from some of the legal representatives of the said Moideenkutti. Defendants 8, 10 and 11 also claim shares in the property by virtue of assignments executed in their favour by certain persons who are also stated to be some of the legal representatives of the said Moideenkutti. Therefore, these defendants preferred R.I.A. No. 517 of 1956 in the lower Court contending that in view of the fact that there is keen dispute between the parties regarding the shares, regarding devolution of right and regarding the original partition set up in the written statement and some other matters raised therein, their assignors should also be impleaded. The plaintiff resisted this application on the ground that he cannot be compelled to implead the assignors in view of the admitted position that they have no subsisting right over the properties and that it is only an attempt to cause unnecessary complications and put the plaintiff to trouble, delay and expense and that he cannot also be compelled to implead persons for the purpose of safeguarding the rights of the party defendants which should be left open to be agitated by them if necessary, in separate proceedings.

Order 1, rule 10 (2) of the Code of Civil Procedure, states :

> "The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added".

The sub-rule corresponds to the second sentence of Order 16, rule 11 of the English Rules of Supreme Court and confers wide discretion on the Court to meet every case of defect of parties but is subject to two limitations, *viz.*, (1) that the Court has no power to join a person as a party if he could not have been originally impleaded under Order 1, rule 1 or rule 3, Civil Procedure Code and (2) that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all points involved in the suit.

The discretion must be exercised in a reasonable manner so as not to cause inconvenience or embarrassment. In exercising the powers under this rule Courts ought to see that they do not load the record with parties who are shown to have only indirect or remote interest and that the trial of the suit is not embarrassed by the simultaneous investigation of totally unconnected controversies. This section does not authorise the Court to introduce into a suit as a defendant a person who claims the property in the suit by a title quite distinct from that under which any of the parties to the suit claims, *Kalian Rai* v. *Ram Ratan*[1], see *Jayagobind* v. *Gouree*[2]. A person can be added only when there are questions directly arising out of and incidental to the original cause of action in which such person has identity or community of interest with one or other original plaintiff or defendant. *Narami* v. *Durgan*[3], see also *Mahammad* v. *Nichols.*[4] The plaintiff who pays heavy Court-fee is after all the *dominus lites*, and is entitled in the absence of the over-riding considerations provided in Order 1, rule 10 (2), to prescribe the carriage of his own suit. The Court should not re-write the plaint or queer the plaintiff's pitch or ordinarily add parties without the concurrence of the plaintiff.

The following three decisions are in point: In *Vithoba* v. *Secretary of State*[5], it is held that the plaintiff is the best judge of his own interests and no defendant should be added against the plaintiff's will even when the defendant asserts that his interests will be affected by the plaintiff's suit and that it is not the intention of law to let third persons ventilate their own grievances in, and thus derive profit from, a suit commenced by another. In *Vaithilinga* v. *Sadasiva*[6], it was held that when a party sought to be added as defendant is not a necessary party but only permissible or proper party, addition cannot be ordered if objected to by the plaintiff and that "all questions involved in the suit," refers to questions only between parties to the suit. Questions involved in the suit do not mean all claims which may possibly be put forward by anybody, *Sitaramayya* v. *Ramappayya*[7]. In *Palanisamy* v. *Komara Chettiar*[8], it was held that the Court should consider mainly whether the presence of the proposed parties would be necessary for adjudicating upon the questions that are involved in the suit and an order for addition of parties should not be made merely with a view to avoid multiplicity of suits if otherwise their presence is not necessary for determining the real questions involved in the suit. See also *Gosta* v. *Sur*[9], *Veerabhadrappa* v. *Shekabai*[10], *Moser* v. *Marsden*[11].

Bearing these principles in mind, if we examine the facts of this case, we find that the learned District Munsif came to the correct conclusion and the persons who are now sought to be impleaded have no subsisting right over the properties and they are sought to be impleaded only for the purpose of getting their evidence and it would not be proper to make them parties to the suit and that the petitioner's apprehension that they would be driven to the necessity of filing a separate suit against these persons is not a sufficient justification to compel the plaintiff to implead them as parties to the suit.

The endeavour of the learned advocate therefore before me was that the learned District Munsif should have allowed the addition of the parties invoking the provisions for third-party procedure. In doing so the learned advocate overlooks the fact that the Court can consider the third-party procedure only on an application filed in terms of Order 8-A of the Code of Civil Procedure. Such is not the case here and it is open to the petitioners to prefer such an application in the lower Court.

This Civil Revision Petition is dismissed.

P.R.N. *Petition dismissed.*

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[1] (1896) I.L.R. 18 A. 306.
[2] 7 W.R. 201.
[3] (1880) I.L.R. 2 A. 738.
[4] (1878) I.L.R. 4 C. 355.
[5] A.I.R. 1925 Nag. 373.
[6] A.I.R. 1926 Mad. 836.
[7] (1916) 5 L.W. 207.
[8] A.I.R. 1950 Mad. 91.
[9] I.L.R. (1946) 1 Cal. 656.
[10] I.L.R. (1939) Bom. 232.
[11] L.R. (1892) 1 Ch. 487.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

K. Sarvotuma Kamath (died) and others .. *Appellants**

v.

Abdulla Beary and others .. *Respondents.*

Limitation Act (IX of 1908), *Articles* 134 *and* 144—*Applicability—Usufructuary mortgage—Transfer by mortgagee of portions of mortgaged property by way of usufructuary mortgage purporting to do so as owner under sale deed obtained subsequent to original mortgage—Suit for possession of alienated portions of property—Limitation—Suit for redemption by representative of mortgagee against original mortgagee—Plea of adverse possession—If open.*

Where immoveable property is transferred by way of usufructuary mortgage, and the mortgagee subsequently transfers portions of the property by way of usufructuary mortgage not as mortgagee but claiming title as owner under a sale deed obtained by him subsequent to his mortgage, a suit to recover possession of the portions so transferred by him would be governed by Article 134 of the Limitation Act. Though the suit is framed as one for redemption, no question of redemption would arise and the suit is really one for recovery of possession of properties, and a suit filed more than 12 years after the date of transfer by the mortgagee is clearly barred and must fail. The fact that the cause of action for redemption of the original mortgage has not yet arisen would be no ground for holding that the suit is within time, as there is no room for the argument that a cause of action cannot be held to be barred even before it has accrued. On the language of Article 134, there is no scope for importing into it ideas of equity and fair play or any general principles which may be more equitable or just.

Seetikutti v. *Kunhi Pathumma*, (1917) 33 M.L.J. 320 : I.L.R. 40 Mad. 1040 (F.B.), followed.

Opinion of Srinivasa Ayyangar, J., in *Seeti Kutti* v. *Kunhi Pathumma*, (1917) 33 M.L.J. 320: I.L.R. 40 Mad. 1040 (F.B.) and Abdur Rahim, J., in *Krishnaswami Ayyar* v. *Subbarathnam Chetti*, (1938) 1 M.L.J. 101, not followed.

It is well established that so long as a mortgage subsists, a person who has come into possession as a mortgagee cannot by setting up, during the continuance of the relation of a mortgagee, any title adverse to that of the mortgagor, inconsistent with the legal relation between them, acquire by the operation of the law of limitation title as owner or any other title inconsistent with that under which he was let into possession, however notoriously and to the knowledge of the other party he might set it up. If a person having no title to the property purports to deal with it and professes to sell it to the mortgagee, that cannot change the character of the possession of the mortgagee or the nature of the property in question. So far as the persons rightly entitled to the property are concerned, that is, the mortgagor and his representatives, the mortgagee cannot prescribe any title by adverse possession against them. So long as the mortgage subsists and the right of redemption has not become barred by limitation, a suit for redemption cannot be resisted and defeated on the ground of adverse possession by the mortgagee by the application of Article 144 of the Limitation Act.

Seshamma Shettati v. *Chickaya Hegade*, (1902) 12 M.L.J. 119 : I.L.R. 25 Mad. 507, followed.

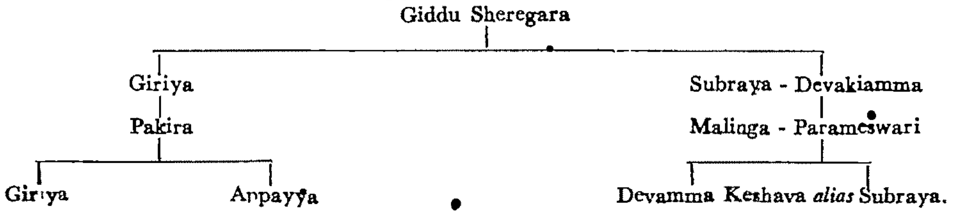
Appeal against the decree of the District Court of South Kanara in A.S. Nos. 60 and 100 of 1951 preferred against the decree of the Court of the District Munsif of Mangalore in O.S. No. 410 of 1950.

A. Narayana Pai for Appellants.

M. K. Nambiar, M. Raghavan, S. Ramayya Nayak, G. K. Bhat and *T. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The suit out of which this appeal airses is a suit for redemption of a usufructuary mortgage, Exhibit A-1, dated 24th July, 1907, executed by two ladies, Parameswari and Devamma, in favour of Raghavayya, for a sum of Rs. 550, the period fixed for payment being thirty years. The right to redeem the property would therefore accrue in 1937. The following genealogical table may be helpful in appreciating the facts of this case.



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*S.A. No. 886 of 1953. 26th March, 1956.

On 20th October, 1945, the plaintiff acquired the suit properties by sale deed Exhibit A-2 from Appayya, son of Pakkira, who claimed to be the reversioner of the last male-holder Keshava *alias* Subraya to whom the suit properties belonged. Keshava died issueless in about 1890 and after his death, the parties being governed by Mitakshara Law, Parameswari would be the heir. But the suit mortgage was executed both by Parameswari and her daughter Devamma, sister of the last male-holder Keshava, the recitals in the document showing that the properties belonged to them heriditarily Parameswari died in 1908, and after her death, Devamma, it appears, applied to have transfer of the registry in her name and having secured it, purported to sell the suit properties to the mortgagee Raghuvayya under Exhibit B-7, dated 6th February, 1912. On the same day she got a gift of a portion of the properties she sold to Raghuvayya under Exhibit B-21. The properties obtained by Devamma by gift from the mortgagee-purchaser were mortgaged by Devamma to the fifth defendant under Exhibit B-23, dated 27th November, 1928. The mortgagee Raghuvayya claiming to be the owner of the properties on the strength of the sale deed Exhibit B-7 in his favour, purported to deal with the same by executing usufructuary mortgages of portions of the properties by three documents, Exhibits B-9, B-10, and B-63 dated 20th November, 1914, 9th January, 1917 and 25th May, 1917, respectively. The mortgagees are now in possession of the property.

The suit was mainly resisted on the ground that it is barred by limitation, the contention being that by reason of the transactions covered by Exhibits B-9, B-10 and B-63 the suit is barred by Article 134 as more than twelve years had elapsed since the date of those documents, since a suit to recover possession of such immoveable properties mortgaged and afterwards transferred by the mortgagee for valuable consideration is governed by Article 134. As regards the other properties which were the subject-matter of the mortgage Exhibit A-1, the contention is that they are barred by Article 144 as Devamma subsequent to the death of her mother Parameswari, and thereafter Raghuvayya have been in possession as absolute owners and have therefore prescribed title by adverse possession. The trial Court rejected both the contentions and granted a decree. In appeal the learned District Judge took a contrary view on both these questions.

It appears to me that in so far as the transactions covered by Exhibits B-9, B-10 and B-63 are concerned, there is no answer to the application of Article 134 as it is worded, since though the transactions under Exhibits B-9, B-10 and B-63 are only usufructuary mortgages executed by Raghuvayya who at the inception, on the date of Exhibit A-1, in 1907, was a usufructuary mortgagee, but on the dates of Exhibits B-9, B-10, and B-63 purported to execute those mortgages not as a usufructuary mortgagee but as owner claiming title under Exhibit B-7. The right to redeem would arise only in 1937 and a contention that a cause of action cannot be held to be barred even before the cause of action had accrued was raised, relying on the view of Srinivasa Ayyangar, J., in *Seeti Kutti* v. *Kunhi Pathumma*,[1] whose view was endorsed by Abdur Rahman, J., in *Krishnaswami Ayyar* v. *Subbarathnam Chetti*[2], but as the other learned Judges in *Seeti Kutti* v. *Kunhi Pathumma*[1], had observed, there is no scope for importing into the language of Article 134 any general principles which may be more equitable and just, and with the language of Article 134, as it is there is no scope for importing into it ideas of equity and fairplay. In the circumstances Article 134 was held to apply to any case whether the cause of action had arisen has contemplated under Article 134 or not, and in view of the language of Article 134 and the view taken by Coutts Trotter, J., and the other learned Judges, there does not seem to be any way except to hold that though as it is framed, it is a suit for redemption, no question of redemption would arise, and it is really a suit to recover possession of properties and twelve years having elapsed since Exhibit B-7, the plaintiff's right to recover possession is barred. Another aspect of the inequitable results to which application of Article 134 would lead to I had occasion to to consider in Second Appeals Nos. 262, 263 and 2032 of 1952 where I also suggested that the Law Commision might take note of the rather unjust results that might result in the application of Article 134 to particular cases the like of which are dealt with not only in this judgment but in the judgment referred to, and consider the revision of Article 134 whether it should continue in the statute book or whether any appropriate amendments should be effected in order to relieve the harsh and inequitable results or this provision in the Limitation Act has to be retained.

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[1] (1917) 33 M.L.J. 320 : I.L.R. 40 Mad. 1040 (F.B.).

[2] (1938) 1 M.L.J. 101 (F.B.).

As regards the other properties not covered by Exhibits B-9, B-10 and B-63, I am unable to follow the reasoning of the learned District Judge in holding that Article 144 is a bar. It is well established that so long as the mortgage subsists, a person who has come into possession as mortgagee cannot by setting up, during the continuance of such relation, any title adverse to that of the mortgagor inconsistent with the legal relation between them—and that however notoriously and to the knowledge of the other party—acquire by the operation of the law of limitation, title as owner or any other title inconsistently with that under which he was let into possession, vide *Seshamma Shettati* v. *Chickaya Hegade*[1]. The argument on behalf of the respondents and the reasoning of the learned District Judge is that Devamma who had no right to the property as Parameswari alone was the heir of the last male-holder, having joined in the execution of the mortgage representing that both were entitled to the property and subsequently, after the death of Parameswari she having dealt with the property as full owner by selling them to Raguvayya. Raghuvayya as purchaser continuing in possession has prescribed title by adverse possession. But for Devamma's joining in the mortgage Exhibit A-1 and her transaction of sale, Exhibit A-7, this argument would not be open to the respondents. But if a person who has no title to the property purports to deal with the same and professes to sell the property to a mortgagee, would it change the character of the possession of the mortgagee or the nature of the property is the question. In so far as the persons that are rightfully entitled to the property are concerned, namely, representatives of the mortgagors Raghuvayya cannot prescribe any title by adverse possession against them, for the reason that his possession could be only as a mortgagee in so far as the mortgagors are concerned, and the character of Raghuvayya's possession must therefore be considered to be that of a mortgagee's possession, unless it is shown that any such acquisition of possession as owner had been recognised by the rightful heirs, in which event it might be contended that the persons who are parties to such acquiescence might be estopped from contending to the contrary. But in this case it is urged that Giriya and Appayya were examined in connection with a dharkast of the adjoining land and certain statements made by them, Exhibit B-49, were relied upon. I have gone through Exhibit B-49 but it does not relate to any question of transfer of title. The statement made by Giriya and Appayya relates only to the grant of some additional rights to possession relating to the subject-matter of the mortgage and the adjoining property. In the circumstances I am unable to find any conduct on the part of Appayya and Giriya to show that they recognised the title of Raghuvayya as full owner. So long as the mortgage subsists and the right to redemption has not become barred, I am unable to understand what steps a reversioner, who is no doubt entitled to possession on the death of the limited estate holder, could take to assert his rights, as the only right he could assert is to ask for possession, which right he could assert before the expiry of the period for a suit for redemption of a usufructuary mortgage, which in this case would be more than sixty years in view of the thirty year's period granted under Exhibit A-1. The suggestion of the learned Judge that the reversioner should have filed a suit and obtained symbolical possession is not correct. On the facts of this case I am unable to hold that in so far as the properties not covered by Exhibits B-9, and B-10, B-63 are concerned, it could be said that the plaintiff as purchaser of equity of redemption has lost his right to redeem the property by limitation or otherwise.

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1. (1902) 12 M.L.J. 119 : I.L.R. 25 Mad. 507.

The result is the appeal is allowed in respect of the properties not dealt with under Exhibits B-9, B-10 and B-63 with proportionate costs throughout. No leave. As regards the amount which will be payable by the plaintiff, which will be in relation to the value of the property decreed to be redeemed, the amount will be fixed by the trial Court, which will also fix the time for payment of the amount.

P.R.N. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

K. K. Venkatachalam Chettiar Company .. *Appellant**

v.

The State of Madras (formerly the Province of Madras) represented by the District Collector of Salem .. *Respondent*

Madras General Sales Tax Act (IX of 1939), section 2 (b)—" Dealer "—Consignee retailer receiving cloth and distributing same to retail dealers under orders of Government in pursuance of control orders—If ' dealer ' liable to tax—Issue of invoices in his name and of invoices by him to retail dealers—Railway receipts sent through Bank and paid for by him—Effect of—Transaction—If " sale ".

A consignee retailer who under the scheme of distribution of controlled cloth, is only an accommodator or a distributing retail consignee, is only an intermediary and not a "dealer" as defined in the Madras General Sales Tax Act. He is simply in the position of an intermediary, his function being only that of an agent for distribution of the goods he receives and not for effecting a sale. He can in no view be a " dealer " and is therefore not liable to be taxed under the Act.

S.A. No. 921 of 1953, followed.

The fact that invoices are sent in his name and that on receipt of information of the despatch of Railway receipts through a Bank, the consignee retailer pays the price, gets the receipt, takes delivery of the goods and distributes the same to the retail dealers under *pro forma* invoices issued by himself, under the directions of the Textile Control Officer, would not make him a " dealer " liable to tax or make the transaction of receipt by him and the transfer by him to the retail dealers, transactions of sale under the Act.

Appeal against the decree of the District Court of Salem in A.S. No. 326 of 1952 preferred against the decree of the Court of the District Munsif of Salem in O.S. No. 627 of 1949.

S. Swaminathan for Appellant.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Court delivered the following

JUDGMENT.—The present is a case where the question is whether a consignee retailer under the scheme of distribution of controlled goods, in this particular case textiles, is liable to pay sales-tax. A similar question was raised in S.A. No. 921 of 1953 before me and I held that the position of the plaintiff therein who was a consignee retail dealer was not that of a dealer and he cannot come within the meaning as defined in the Act and that therefore he would not be liable to pay any sales tax. I held that even though he does not call himself as an agent, he was only an accommodator or a distributing retail consignee, and the fact that he does not describe himself as an agent does not change the real character of the transactions and his part in such transaction, that the remuneration which he was paid was not a percentage of the price but the actual expenses incurred and interest on the amount and the fact that interest was provided for was a further circumstances in support of the view that whatever amounts were advanced were by way of loans or advances for the purpose of accommodating the facilities to put through the transactions, and which amounts were reimbursed by payments together with interest and that taking every circumstances into consideration and especially the terms of the circular orders under which the plaintiff therein had been acting, there was no question of treating him as a dealer within the meaning of the definition in the Act. The same circular orders are the subject-matter of the present second appeal under which the plaintiff was acting. In these circumstances the plaintiff must succeed in this second appeal.

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* S.A. No. 155 of 1954. 24th August, 1956.

It is, however, contended by the learned Assistant Government Pleader that the facts of this case are different and that therefore they would not attract the application of my judgment in S.A. No. 921 of 1953 referred to above. It is pointed out that in the present case the admission of P.W. 1 is that on receipt of information about the despatch of the railway receipt through a bank, they used to pay the price and get the receipt, take delivery of the goods and distribute to the retail dealers as per directions of the Textile Control Officer. On this admission it is urged that there are two sales one from the import dealer directly to the consignee retailer that is the plaintiff, since the invoices are sent in his name and the Railway Receipts are sent through bank which the plaintiff honoured by payment, and thereafter when the goods are sold to the retailer, though as per directions of the Textile Control Officer. It does not appear to me from the mere admission of the plaintiff's agent, that the course of transaction in the present case is in any way different from the one which was concerned in S.A. No. 921 of 1953. No doubt there are certain invoices issued by the plaintiff to the retailers which are referred to as *pro forma* invoices. But they appear to be necessary in view of the directions of the Textile Control Officer contained in Exhibit A-6 dated 15th May, 1946. In that communication which is addressed to the plaintiff, it is stated that the plaintiffs are to distribute the particular bales of cloth referred to in that communication received by them, from Sujansingh Mehta & Co., Madras, who are apparently import dealers, as consignee dealers, to the retail dealers whose names are also mentioned in the said communication. In paragraph 3 of that communication itself, the plaintiffs are directed to intimate the import dealer about the names of the retailers with their licence numbers to whom the goods were distributed with particulars regarding the number of pieces supplied to each with exact yardage, the ex-mill price, the ten per cent profit and sales tax, to enable that dealer to prepare the invoices in the names of those retail dealers. The preparation of the invoices by the plaintiffs, which are referred as temporary invoices, is for the purpose of the import dealer to prepare invoices and send them direct to the retailer. Therefore, there is no question of two sale transactions, one by the import dealer to the consignee retailer in the position of the plaintiffs and another from the consignee retailer to the retailer who eventually gets the clothes in pursuance of the directions of the Textile Control Officer. Even assuming that such a procedure had been adopted in this case, it would not affect the position of the consignee retailer who is only an intermediary and it is not for him to establish, as has been suggested by the learned District Judge in his judgment that he is the agent appointed by the Government. He is not a dealer and it is not necessary for him to show that he was the agent of the Government. It is enough for him to establish that by virtue of the scheme of distribution adumbrated in the several circular orders, his position is that of any other person who passes the goods from one hand to another under the directions of the Government in pursuance of the Control Regulations they have laid down for enforcement. He is simply in the position of an intermediary and his function is correctly described, even in the circulars, as being only for distribution of the goods and not for effecting sale. He can in no view of the case be a dealer and therefore he is not liable for being taxed under the Sales-tax Act.

The result in this second appeal is allowed with costs. No leave.

P.R.N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

C.B.R. Ratnam and Company by its Sole Proprietor C.B.R. Ratnam.. *Petitioner**

v.

D. Ekambaram and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *as amended by Act (XLIII of* 1953), *sections* 25-F *and* 25-I—*Construction and scope—Retrenchment pay—Order for recovery—Power of State Government—Conditions for exercise of—Dispute as to right to retrenchment pay and as to quantum of same—Jurisdiction to determine—Order for recovery—Legality—Remedy of workman—Civil Procedure Code (V of* 1908), *section* 9—" *Civil right* ".

Under section 25-I of the Industrial Disputes Act, 1947, as amended in 1953, the right of the Government to order recovery springs into existence, and they can step in, only on there being an ascertained liability which the employer has not discharged by payment. They are not, however, vested with any power to ascertain (*a*) whether the workman is a retrenched workman, and (*b*) the quantum of compensation, in case of dispute as to these matters.

The section proceeds on the basis of a pre-determined or ascertained liability. There is no machinery provided in the Act for the adjudication of these matters in the event of dispute.

Therefore, where a contention is raised that retrenchment compensation is not payable under section 25-F of the Act, and if payable, the amount would not be that claimed by the workman, neither the Labour Officer nor the State Government would have power to adjudicate upon these matters and ascertain the sum due. In the absence of any sum so ascertained by a competent authority, the State Government have no power to order recovery of retrenchment compensation under section 25-F. Any order for recovery under such circumstances would therefore be without jurisdiction and liable to be quashed.

Joglekar v. *Barsi Light Railway Company, Ltd.*, A.I.R. 1955 Bom. 294 and *Mehra and Co. Tea Factory* v. *Kanhaya Lal and Bros.*, (1956) 1 J.P. 573, distinguished.

The workman is not, however, wholly without remedy, as he can bring the matter before an ordinary civil Court, the statutory right created in the workman being a " civil right" within the meaning of section 9, Civil Procedure Code.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for records of the case leading to the order of the Second Respondent in G.O. Ms. No. 3263 (Industries Labour and Co-operation Department) dated 10th July, 1956 and quash the said order as *ultra vires* or without jurisdiction.

N. Suryanarayanan, for Petitioner.

O. Radhakrishnan and The Special Government Pleader (*V.V. Raghavan*); for Respondents.

The Court made the following

ORDER.—An order of the Government directing recovery of arrears of land revenue amounting to Rs. 828-2-6 from the petitioner is challenged in this writ petition as *ultra vires* and beyond their jurisdiction.

The petitioner is C.B.R. Ratnam and Company which is a proprietory concern carrying on business as mechanical engineers. One D. Ekambaram, the first respondent in this writ petition was a foreman employed in the petitioner's firm. He ceased to be so employed on and from 12th December, 1955. This Ekambaram complained about this by his letter of even date stating that the employer had improperly terminated his services and also asking for reasons as to why his services were dispensed with.

A few days later he brought this improper discharge from service to the notice of the Labour Officer and requested him to take up this for conciliation and get him re-instated. The Labour Officer issued notice to the petitioner and held an enquiry into the workman's complaint. While these matters were pending the workman filed an application before the Government on 6th January, 1956, stating that he had been retrenched by the properietor and was therefore, entitled to compensation for such retrenchment under section 25-F of the Industrial Disputes Act (XIV of 1947). In this application he prayed that a sum of Rs. 960, computed by him as per the provisions of the Act and payable to him by way of retrenchment compensation might be collected from the petitioner as arrears of land revenue and made over to him. The enquiry before the Labour Officer went on and in the course of this the petitioner here urged two maters (1) that the claim by the workaman on the footing that he had been working for a continuous period of twelve years was incorrect and (2) that the workman was constantly absenting himself from duty without leave and that he turned up for work on 10th December, 1955 and that then an explanation was called for as regards his absence, he left the employment voluntarily stating that he would seek remedy through Labour Tribunals. On this latter ground it was contended that the employee was not one whose services had been terminated on account of retrenchment so as to give rise to a claim for compensation for retrenchment under the relevant provisions of the Industrial Disputes Act. The Labour Officer completed his enquiry and evidently submitted some report to the Government about which the employer was not informed. The Government thereupon passed an order on 10th July, 1955, which after reciting the application from the workman dated 6th January, 1955 and the report from the Commissioner of Labour, Madras, dated 8th May, 1956 went on in its operative portion to state

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* Writ Pet. No. 934 of 1956. 26th November, 1956.

> " The Government after careful consideration are satisfied that the amount of Rs. 829-2-6 is payable to the workman as compensation under Section 25-F of the Industrial Disputes Act, 1947, and that the Management of C. B. R. Ratnam and Co., 18, Wallers Road, Mount Road, is liable to pay the said compensation ".
>
> " As the management has failed to pay the compensation, the Government hereby direct the Collector of Madras to take necessary action in pursuance of section 25 (*i*) of the Industrial Disputes Act for the recovery of the said sum of Rs. 829-2-6 due to the said workman from the said management as arrears of land revenue or as a public demand and to disburse the amount so received to the said workman."

It is the legality of this order that is challenged in this writ petition.

The provision in regard to the payment of compensation in the event of retrenchment was introduced by Central Act (XLIII of 1953) amending the Industrial Disputes Act, 1947. This amending Act introduced a new chapter, Chapter V-A dealing with lay-off and retrenchment. Sections 25-A to 25-E dealt with compensation in the event of lay-off and Section 25-F to 25-H with conditions subject to which a workman might be retrenched and the compensation payable to him in that event. In relation to the question involved in the present petition the matterial provision is section 25-P which is in these terms:

> *Condition precedent to retrenchment of workmen*:—No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until
>
> (*a*) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice wages for the period, of the notice :
>
> Provided that no such notice shall be necessary if the retrechment is under an agreement which specifies a date for the termination of service :
>
> (*b*) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days average pay for every completed year of service or any part thereof in excess of six months and,
>
> (*c*) notice in the prescribed manner is served on the appropriate Government.

The expression " retrenchment " used in section 25-F is defined in a newly introduced section 2(oo) reading :—' Retrenchment means the termination by the employer of the services of a workman for any reason what-so-ever, otherwise than as punishment inflicted by way of disciplinary action. It will thus be seen that section 25-F read in the light of the definition of retrenchment creates a statutory liability in an employer to pay compensation to his workman in the event of his being retrenched as defined. Section 25-I enables the Local Government in the event of the sum not being paid by the employer to recover this retrenchment compensation from the employer as an arrear of land revenue and make over the sum so recovered to the workman. Section 25-I runs :—

> 'Any money due from an employer under the provisions of this chapter whether by way of compensation or by way of wages may, without prejudice to any other mode of recovery, be recovered in the same manner as an arrear of land revenue or as a public demand by the appropriate Government on an application made to it by the person entitled to the money."

We have thus two provisions which come into play on a retrenchment as defined (1) a statutory pecuniary liability on the employer to pay his workman sums determined on the basis of the calculations set out in the statute and (2) a provision for recovery of such sums, if unpaid, by the Local Government.

What, however, is lacking is provision of any machinery for determining the questions which would obviously arise in cases of dispute : (i) was the workman who makes the claim 'retrenched' so as to give rise to the statutory liability : (ii) the determination of the facts which underlie the computation of the amount of compensation under section 25-F (*b*). There might be disputes between the employer and the workman as regards both these matters. For instance in the present case it is the contention of the employer that the workman was not discharged but that he voluntarily terminated his own employment by refusal to attend. If this were made out, it is not suggested that the workman would be entitled to any compensation. Again in regard to the quantum of compensation it was the case of the petitioner that the workman was not in his services during prolonged periods during the 12 years. If this again were established by him, the quantum of compensation payable would be much less than what is sought to be recovered under the order impugned.

I have set out the terms of section 25-I and it is clear that the right of the Government to order recovery springs into existence and they could step in, only on there being an ascertained liability which the employer has not discharged by payment. They are not, however, vested with any power to ascertain (*a*) whether the workman is a retrenched workman and (*b*) the quantum of compensation if these are matters of dispute. In the absence of any specific provision in this regard I am aware of no rule of construction by which I could hold that Government were impliedly vested with jurisdiction to determine these matters and ascertain the sum. In my opinion the very terms of section 25-I of the Act precludes such a construction, for to repeat what I have said the section proceeds on the basis of a predetermined or ascertained liability. If the Government were not this judicial or quasi-judicial authority, neither the learned Special Government Pleader who appeared for the State nor the learned counsel for the respondent workman was able to point out any other machinery provided by the Act for the adjudication of these matters in the event of there being a dispute. It is certain that the labour officer who conducted the enquiry and ascertained the facts on the basis of which the sum now sought to be recovered from the petitioner was arrived at had no jurisdiction under the terms of the Industrial Disputes Act to adjudicate upon this question. This would be so whether the Labour Officer were treated as functioning as "a conciliation officer" under the Act or as exercising a delegated power from Government to ascertain the amount of retrenchment compensation due to the workman under section 25-F. In my judgment there is a lacuna in the enactment and the Court can do no more than leave that to be made good by appropriate legislation.

The learned Special Government Pleader invited my attention to a decision of the Bombay High Court reported in *Joglekar* v. *Barsi Light Railway Company Ltd.*[1], where Chagla, C.J., delivering the judgment of the Bench upheld an order passed under section 15 of the Payment of Wages Act directing the employer to pay retrenchment compensation. I see nothing in the decision which helps the respondent in this case. In that decision a point was raised as regards the jurisdiction of the authority under the Payment of Wages Act to determine these matters but counsel for the employer expressly agreed before the Court that he was not interested in disputing that jurisdiction but was content to contest the adjudication on the merits as to whether in the events which took place, there was retrenchment so as to give rise to the statutory liability to pay compensation. Learned Counsel also referred me to a decision of the Punjab High Court in *Mehra and Co. Tea Factory* v. *Khanyia Lal and Bros*[2]. That also was a case relating to the decision of an authority under the Payment of Wages Act. If in the present case an application were made to the authority under the Payment of Wages Act for the ascertainment of the amount due to the workman as retrenchment compensation, it will be time enough to consider whether that enactment could be resorted to, to obtain an adjudication as regards the liability to lay off and if so the amount of retrenchment compensation. It is sufficient for the present purpose to say that where a contention is raised that retrenchment compensation is not payable under the terms of section 25-F and if payable the amount would be not that claimed by the workman, neither the labour officer nor the State Government have power to adjudicate upon these matters and ascertain the sum due and in the absence of any sum so ascertained by a competent authority the State Government have no power to order recovery of retrenchment compensation under section 25-I.

In passing, I might mention that the workman on whom rights are conferred by section 25-F is not wholly without remedy. If a statutory right is created in favour of a person, but this is made dependent on the existence of certain stated facts but the Statute enacts no special machinery for the ascertainment of the statutory conditions on which the right arises, such a matter could certainly be brought up before an ordinary civil Court for its determination. The statutory right created in the workman would certainly be a 'civil right' within the meaning of section 9 of the Civil Procedure Code attracting the jurisdiction of an ordinary civil Court, and as such a Court would under this section be deprived of its jurisdiction only if these were barred expressly or by implication, In the absence of any special machinery, there would be no bar to its jurisdiction. If the workman succeeds and a decree is obtained, the amount due to him under section 25-F having been ascertained, he can then approach the Government, to exercise its powers under section 25-I and recover the sum due to him as an arrear of land revenue without having to proceed under Order 21, Civil Procedure Code to realise the fruits of this decree. Of course this was not what Act XLIII of 1953 intended, and the procedure certainly entails great hardhsip upon the workman.

I have pointed out that resort has also been had to the provisions of the Payment of Wages Act but as to this course being available I express no opinion since it does not arise for consideration before me.

The result is that the order of the Government directing recovery of the sum named in their order from the petitioner as an arrear of land revenue must be held to be one without jurisdiction. The Writ Petition is allowed and the rule is made absolute, and the order of the Government G.O. Ms. No. 3263 (Industries, Labour and Co-operation Department) dated 10th July, 1956 is set aside. There will be no order as to costs.

P.R.N. —— *Writ petition allowed.*
Rule made absolute.

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[1] A.I.R. 1955 Bom. 294.

[2] 1956 L.J.P. 573.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Ponnuswami Chettiar .. *Petitioner.**

v.

P. Vellaimuthu Chettiar .. *Respondent.*

Negotiable Instruments Act (*XXVI of* 1881), *section* 4—*Promissory note—Name of payee not mentioned but payee described as* " *son of P* "—*Validity and enforceability of note—Evidence to prove name of payee—Admissibility—Evidence Act* (*I of* 1872), *section* 92, *Proviso* 6.

The absence of the name of the payee in a promissory note will not make the instrument invalid, when the payee was known with certainty even at the time of execution. When the payee is described in the note as " son of *P* ", and a particular son of *P* is known to have lent the amount to the maker, though his name is not mentioned in the note (perhaps by sheer slip or accident), the instrument cannot be held to be invalid or unenforceable. Section 92 Proviso 6 of the Evidence Act would apply to the case and evidence regarding the name of the payee can be let in, when the description is defective. *Abdul Hakim Ear Mahomed* v. *Ebrahim Solaiman Salahjee and Co.*, (1920) 33 C.L.J. 132, Followed.

To say that the name of the payee must always be mentioned to make a promissory note valid is not sustainable in any modern Court of justice, equity and good conscience.

Petition under section 115 of Act V of 1908 praying the High Court to review the decree of the Court of Small Causes at Madras, dated 6th May, 1955 and passed in N.T.A. No. 220 of 1954 (against S.C.S. No. 8588 of 1953).

B. V. Viswanatha Ayyar and *K. Tiruvenkatachariar* for Petitioner.

P. Muthukumaraswami Mudaliar and *P. Venkatachalapathi* for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises an interesting question of law not exactly covered by any ruling. It is a petition by one Ponnuswami Chettiar, the defendant in S.C.S. No. 8588 of 1953 on the file of the Court of Small Causes, Madras, for revising and setting aside the judgment and decree in N.T.A. No. 220 of 1954, which was filed against the decree and judgment of the learned Chief Justice in that suit. The main point of law is whether the absence of the name of the payee in a promissory note will make the note invalid, though the payee was known with certainty even at execution. The facts are briefly these : It was a suit brought against the petitioner by one Vellaimuthu Chettiar for the recovery of Rs. 1,177-8-0 the principal and interest due on a promissory note, Exhibit- P-1, dated 16th November, 1950, for Rs. 1,000. Two defences were raised by the petitioner in the lower Courts. One was that the promissory note was not supported by consideration. The lower Courts found that the promissory note was fully supoprted by consideration, and Mr. B. V. Viswanatha Ayyar, learned Counsel for the petitioner, was not able to shake that finding which is, in my opinion, quite correct.

The next plea was that the promissory note was not executed in favour of *a known and certain person* and, so, would be invalid. Mr. B. V. Viswanatha Ayyar urged vehemently before me that a promissory note in favour of a person without his name being mentioned in it should be held to be totally invalid and inoperative, even though full consideration might have passed and the person lending was known with precision even at the time of execution by the person borrowing, and though the description in the context, could refer only to him. The description of the payee in the suit promissory note was ' son of a A. Palaniandi Chettiar '. He was certainly that. But there are also three other sons of Palaniandi Chettiar, according to the plaintiff, though they never lent a pie to the petitioner and had not come into the picture at all. I think the law is not so wooden as to allow this kind of quibbling by a debtor in a desparate attempt somehow to escape his just liability. If really the lender was not known, and if Rs. 1,000 had been brought by a maid-servant or other servant from the house of Palaniandi Chettiar and handed over to the petitioner with the statement that a son of Palaniandi Chetti had lent him this Rs. 1,000, and the petitioner had honestly been ignorant as to who the lender was, and had executed a promissory note in favour of a son of Palaniandi, then the case might be at least arguable that Palaniandi had four sons and that the petitioner had executed the suit note without knowing or seeing the particular son who lent him the Rs. 1,000, and so the promissory note would fail as the payee was not certain. But here, " the son of Palaniandi " who lent the money was the plaintiff Vellaimuthu Chettiar, who swore to it, and it was not alleged by the borrower, the defendant, that any of the other three sons of Palaniandi had lent him a pie out of the amount in that pronote. The other three sons were far away, and had nothing to do with the petitioner or this promissory note. Though the name of the plaintiff was not mentioned (perhaps by sheer slip or accident), the lender and borrower knew it, and there was the description. To say that the name must always be mentioned to make a promissory note valid is, in my opinion, not sustainable, in any modern Court of justice, equity and good conscience, though such a plea might have been allowed in a Court, like the old Anglo-Saxon Courts, deciding on outworn formulae without reference to living facts. Many a Hindu woman will not name her husband but to say from that act that she has no husband will be absurd. Many a man is known by his caste or village or official name, or surname, like Mudaliar, Ayyar or Rao, Ambedkar, Gandhi, Nehru, Kirloskar, Prime Minister, Raja of Sandur, etc. and not by his personal name. To say that hundreds of Raos, Mudaliars, Ayyars, Gandhis, Nehrus, etc. might have been the persons who lent the money, when the particular man who has lent the money is known, even at that time, beyond all doubt, to the lender and the borrower is, in my opinion disingenuous and meaningless. The Hindu law-givers and Mimamsakas have said 2,000 years ago that ' I ' cannot be made into a ' O ' or ' O ' into ' I ' by any amount of quibbling, and that arguments will not avail to show that there is no gooseberry on the palm when it is there. So too, no amount of quibbling can change the fact that this particular promissory note was executed by the petitioner in favour of the plaintiff, that particular son or Palaniandi. This defence had been raised only because the defence of " no consideration " collapsed. The plaintiff swore that he was the man who lent, and the defendant would not swear that the plaintiff was not the man who was mentioned in the promissory note as the lender. The description in the promissory note is, no doubt, a little defective because of the failure to mention the rank of the plaintiff among Palaniandi's sons like ' first son of Palaniandi ' etc. But the evidence (which can be let in in such cases to clear the pretended, but not real, ambiguity) shows that the parties knew even then with certainty that the lender was the plaintiff, and no other son of Palaniandi. Section 92, Proviso 6 of the Indian Evidence Act will apply as held by the learned Judges at the New Trial and evidence regarding the name could be let in in such cases. The ruling in *Abdul Hakim Ear Mahomed* v. *Ebrahim Solaiman Salahjee & Co.*[1], shows this. In this view, the Civil Revision Petition has no merits, and is dismissed, but in the circumstances, without costs.

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* C.R.P. No. 858 of 1955. 7th December, 1956.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Kamakshi Ammal (dead) and another .. *Appellants.*

v.

Arukkani Ammal and another .. *Respondents.*

Limitation Act (IX of 1908), Article 180—Applicability—Sale in execution—When becomes absolute.

Article 180 of the Limitation Act must be read not only with the provisions of Order 21, rule 92 (1) of the Code of Civil Procedure, but also with the other material sections and orders of the Code.

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[1] (1920) 33 C.L.J. 132.

* L.P.Appeal No. 275 of 1952. 17th December, 1956.

It is only when proceedings started during the course of execution come to a final termination, that it can be said that the Court sale has become absolute. Accordingly where the decree-holder filed a suit to set aside an order allowing a claim and the suit terminated in a compromise an application by the decree-holder under Order 21, rule 95, Civil Procedure Code made within three years from the date when the suit was disposed of is within time.

Chandra Mani Shaha v. *Anarjan Bibi.* (1934) 67 M.L.J. 79 : L.R. 61 I.A. 248 : I.L.R. 61 Cal. 945 (P.C.), followed.

Appeal under clause 15 of the Letter's Patent against the order of the Honourable Mr. Justice Ramaswami Gounder, dated 24th October, 1951 and made in A.A.A.O. No. 49 of 1950 preferred against the order of the District Court of Tiruchirappalli in A.S. No. 342 of 1948 (E.A. No. 760 of 1947 in O.S. No. 104 of 1941, District Munsif's Court, Tiruchirappalli).

K. S. Ramamurthi and *T. R. Mani* for Appellants.

M. S. Venkatarama Ayyar for Respondents.

Judgment of Court delivered by

Rajamannar, C.J.—In our opinion the application of Article 180 of the Limitation Act to the facts of this case by the learned Judge was right. Though the third column of Article 180 refers to the date when the sale becomes absolute, that clause must be read not only with the provisions of Order 21, rule 92 (1) of the Code of Civil Procedure, but also with the other material sections and orders of the Code. This view has been authoritatively enunciated by their Lordships of the Judicial Committee in *Chandra Mani Shaha* v. *Anarjan Bibi*[1]. In the the present case there was an application under Order 21, rule 58, Civil Procedure Code by Nagammal, who claimed under a possessory mortgage, and that claim was, as a matter of fact, allowed on the 14th June, 1943. The decree-holder filed a suit to set aside this claim order as she was entitled to do. This suit terminated in a compromise decree only on 15th August, 1944 and the application under Order 21, rule 95, Civil Procedure Code was made by the decree-holder on 14th August, 1947, within three years from the date when the claim suit was disposed of. We are clearly of the view that the sale could not be said to have become absolute till the claim suit was finally disposed of on 15th August, 1944. Till then the title of the judgment-debtor remained to be finally settled *viz.*, whether the judgment-debtor was entitled to the entire property unencumbered, or she was entitled only to the equity of redemption at the time of the attachment and the sale. Till the rights were finally adjudicated in the course of the execution proceedings, it cannot be predicated what exactly the purchaser is entitled to get by virtue of his purchase. It will be only then that she can file an application for delivery of possession. If it be finally held that she was only entitled to the equity of redemption, she would be entitled only to symbolical possession under Order 21, rule 96, Civil Procedure Code. If, on the other hand, the possessory mortgage was found to be sham and nominal and the judgment-debtor was held to be entitled to the entire property, then the decree-holder will be entitled to obtain delivery of possession of the property itself. Till this was determined, it cannot be said that the Court-auction sale has become absolute.

Reliance was placed by Mr. Ramamurthi for the appellant on the decision in *Sornam Pillai* v. *Tiruvazhi Perumal Pillai*[2]. But in that case the judgment-debtor filed a suit, not in continuation of any proceedings in execution, but independently for setting aside the Court sale after declaring that the decree in the suit was not binding on him. Obviously he could not have taken up that stand in the course of execution, because the executing Court could not possibly go behind the decree. That decision has no bearing on the facts of this case.

We agree with Ramaswami Gounder, J. that the principle of the Privy Council decision above mentioned would govern the present case also. It is only when proceedings started during the course of execution come to a final termination that it can be said that the Court sale has become absolute. The appeal is dismissed with costs.

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[1] (1934) 67 M.L.J. 79 : L.R. 61 I.A. 248 : I.L.R. 61 Cal. 945 (P.C.).

[2] (1926) 51 M.L.J. 126.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

E. K. Nagamanickam Chettiar .. *Petitioner.**

v.

Nallakanna Servai .. *Respondent.*

Madras Buildings (Lease and Rent Contol) Act (XXV of 1949), *section* 7 (3) (*a*) (*iii*)—*Requirement of non-residential building by a landlord for his Business—Scope of.*

The principle of section 7 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act, which provides for a landlord requiring additional accommodation for the purposes of a business he is carrying on, may well apply to cases arising under section 7 (3) (*a*) (iii) of the Act also. Where a landlord who is carrying on business in camphor in a rented building requires his own building for installing a power-driven machinery for manufacturing camphor, which could not be done in the rented building, even though there may be no threat of eviction from the rented building and there is no question of additional accommodation, it is a case of a landlord requiring accommodations necessary for carrying on his business with the aid of power-driven machinery and he is entitled to maintain an application for eviction of the tenant.

Venkatasami and Sons v. *Virabhadraswami*, (1955) An. W.R. 695, Followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Tiruchirappalli, dated 2nd July, 1954 and made in C.R.P. No. 29 of 1953 (H.R.C. Appeal No. 31 of 1953 on the file of the Court of the Subordinate Judge, Tiruchirappalli preferred against the order of the Additional Rent Controller, Tiruchirappalli in H.R.C. No. 95 of 1952).

M. R. Narayanaswami for Petitioner.

R. Ekambaram for Respondent.

The Court delivered the following

JUDGMENT.—In this case the landlord, who is the petitioner before me, sought to evict the tenant under section 7 (3) (iii) of the Madras Buildings (Lease and Rent Control) Act, on the ground that he wanted the building for the business which he was carrying on. It was true that he was carrying on business in camphor in a rented building and he has not been threatened with eviction therefrom. But the learned Subordinate Judge, the appellate tribunal, has found—and that finding cannot be challenged—that the landlord desires to instal power-driven machinery for the said business. There is a finding of fact of the learned Subordinate Judge that the rented building which he is now occupying is unsuitable for the installation of power-driven machinery. Indeed, the landlord's application for a licence has been refused by the Municipality. It follows therefore that he is not in occupation of a building for the purpose of carrying on the business of manufacturing camphor with the help of power-driven machinery. He would therefore be *prima facie* entitled to the benefit of section 7 (3) (*a*) (iii) of the Act. Section 7 (3) (*c*) indicates that a landlord is entitled to evict a tenant who is occupying a portion of his non-residential building if he requires that portion also as additional accommodation for the purpose of the business which he is carrying on. The principle underlying this provision would apply equally to this case where it is not a case of requiring additional accommodation, but it is a case of requiring accommodation necessary for carrying on the business with the help of power-driven machinery. I entirely agree with the reasoning of Viswanatha Sastri, J. in the recent decision of the Andhra High Court in *Venkataswami & Sons* v. *Virabhadraswami*[1]. The learned District Judge was wrong in his application of the material provision of the Act.

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* C.R.P. No. 240 of 1955. 13th December, 1956.

[1] (1955) An. W.R. 695.

The Civil Revision Petition is allowed and there will be an order of eviction passed against the respondent. The respondent will have four months from to-day to give vacant possession to the petitioner. There will be no order as to costs throughout.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

S. AR. ST. Arunachalam Chettiar .. *Petitioner**

v.

S. N. S. Narayanan Chettiar and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 56 (1)—*Construction—" After an estate is notified a dispute arises "—Interpretation—Dispute originating before notification but continuing unsettled thereafter and coming for adjudication—Jurisdiction of Settlement Officer to decide.*

The disputes referred to in the opening words of section 56 (1) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 would not exclude disputes whose origin was earlier than the notified date but which have continued since then. On a proper construction, section 56 means and must be read as meaning that all disputes which are factually present after the notified date came within the jurisdiction of the Settlement Officer and within section 56 (1). Disputes which are excluded are only those in regard to which there have been binding adjudication by the ordinary Courts before that date and matters pending before other authorities before the notified date. In regard to all other disputes, the dispute " arises " after the notified date within the meaning of section 56 (1), if notwithstanding its having originated at an earlier date, it continues thereafter, for the dispute is a difference which exists until it is settled, and it is the existence of the dispute and not its origin that is referred to in the section.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records, relating to the order of the Estates Abolition Tribunal, Madurai, dated 14th March, 1955 in R.A. No. 373 of 1954 reversing that of the Assistant Settlement Officer, Sivaganga in Application No. 1 of 1954 and quash the said order.

R. Gopalaswami Iyengar for Petitioner.

A. Sundaram Iyer and *V. Srinivasan* for the Special Government Pleader on behalf of Respondents.

The Court made the following

ORDER.—The question arising for consideration in this Writ Petition is as regards the proper construction of section 56 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, (Madras Act XXVI of 1948). The petitioner herein and the first respondent were rival claimants to the grant of ryotwari patta in regard to certain lands in an estate notified and taken over by the Government. Section 56 (1) of the Act under which the application was filed by the petitioner enacts :—

> (1) " Where after an estate is notified a dispute arises as to (*a*) whether any rent due from a ryot for any fasli year is in arrear or (*b*) what amount of rent is in arrear or (*c*) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer ".

The next sub-section runs

> (2) " Any person deeming himself aggrieved by any decision of the Settlement Officer under sub-section (1) may within two months from the date of the decision or such further time as the Tribunal may in its discretion allow, appeal to the Tribunal and its decision shall be final and not liable to be questioned in any Court of law."

No objection was raised by the first respondent to the jurisdiction of the Settlement Officer to proceed with the enquiry and this officer after a full investigation of the evidence decided in favour of the petitioner. The first respondent, thereupon filed an appeal to the Tribunal under section 56 (2) of the Act and the

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* Writ Pet. No. 528 of 1955. 19th September, 1956.

Tribunal set aside the order of the Settlement Officer on the ground that he had no jurisdiction to entertain the application. The reasons assigned by them for this conclusion may be stated in their own words :

> " In this case we are concerned only with section 56, clause (1) sub-clause (*e*) as the dispute is as to who is the lawful ryot in respect of the holding in qusetion. The conditions required to be satisfied under section 56, clause (1) (*c*) are (1) that the dispute should arise after the notification of the estate and (2) that the dispute should relate to a holding........ It is clear from the evidence that the dispute between the parties as to who is the lawful ryot of the land in question arises before the notification of the estate. That being so the condition that the dispute should arise after the notification of the estate as required by section 56 (1) of the Act is not satisfied."

On this reasoning the Tribunal held that the proceedings before the Assistant Settlement Officer were without jurisdiction and therefore, set aside his order. It is the correctness of this construction of section 56 that is challenged by the petitioner in this writ petition. The State of Madras has been impleaded as the third respondent in these writ proceedings and they, through the Special Government Pleader supports the writ petitioner and contends that the interpretation put upon the section by the Tribunal is wrong and has, therefore, to be set aside.

As this is probably the first occasion when the construction of section 56 of the Act has come up before this Court, I think it is necessary to discuss the matter in some detail.

The entire argument of the Tribunal is rested on the collocation of the words " dispute arising after an estate is notified." In the first place section 56 occurs in the chapter headed ' Miscellaneous '. Its position is just after section 55 which deals with collection of arrears of rent by the landholder after the notified date. Sub-sections (*a*) and (*b*) of section 55 (1) refer to disputes which might arise in connection with the liability of the ryot to pay rent or its quantum. A reference to section 55 would show that the liability for the rent or its quantum may be in respect of a period anterior to the notification. If section 56 were to be the machinery for deciding the disputes in relation to the rent payable for faslis 1356 and 1357 it would follow that the disputes referred to in the opening words of section 56 (1) would not exclude disputes whose origin was earlier than the notified date but which have continued since then. If, therefore, a dispute in relation to matters mentioned in section 56 (1) (*a*) and (*b*) would take in disputes originating earlier than the notified date but continuing even, afterwards, the nature of the dispute referred to in sub-clause (*c*) of section 56 (1) would not be different. In my opinion, the proper construction of that section is to hold that all disputes which are factually present after the notified date come within the jurisdiction of the settlement officer and within section 56 (1). Disputes which are excluded are only those in regard to which there have been binding adjudications by the ordinary Courts before that date or matters pending before other authorities before the notified date. In regard to all others the dispute " arises " after the notified date within the meaning of section 56(1) if notwithstanding its having originated at an earlier date it continues thereafter, for the dispute is a difference which exists until it is settled and it is the existence of the dispute that is referred to in the section and not its origin. In this view the order of the Abolition Tribunal, Madurai in R.A. No. 373 of 1954 is set aside as erroneous. The Tribunal will consider the appeal before it on its merits and dispose of it in accordance with law. There will be no order as to costs in this Writ Petition.

P.R.N. *Petition allowed.*
Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE RAMASWAMI.

The State of Madras, represented by the District Collector, West Tanjore .. *Appellant**

v.

Kassimia Charities, Rajagiri, represented by hereditary Managing Trustee R.E.M.S. Abdul Hameed and another. .. *Respondents.*

Constitution of India (1950), *Article 226—Scope of—Questions of fact—Question whether lands constituted an "estate" under Madras Estates Land Act*, (1 *of* 1908), *section* 3 (2)—*Writ proceedings under Article 226—Propriety of—Normal and equitable course—Parties to be referred to regular suit.*

Article 226 of the Constitution cannot be invoked to convert a petition under it into a regular suit, so as to determine questions of fact on a consideration of documentary evidence as in an original suit. The normal and more satisfactory course when a question of fact is involved, *e.g.*, whether certain lands did or did not form an "estate" within the meaning of section 3 (2) of the Madras Estates Land Act, 1908, would be the institution of a suit in which the parties can adduce all available evidence and there would be a judicial consideration of all the evidence adduced and findings would be arrived at, which in their turn could be canvassed, if necessary, in a Court of appeal, if not in more than one Court. The just and equitable course in such a case from the point of view of all parties concerned would be to refer the aggrieved parties to a suit and not to dispose of the question finally in writ proceedings merely on the ground that the proceedings in the High Court were pending for a long time and that all the materials were placed before the Court and the question was argued at length.

Writ Appeal, under Clause 15 of the Letters Patent, against the order of the Honourable Mr. Justice Rajagopalan, dated 15th February, 1955 and made in W.P. No. 737 of 1952, presented to the High Court under Article 226 of the Constitution of India for issue of a writ of *certiorari* calling for the records in the proceedings taken by the first respondent therein under Madras Act XXX of 1947 with regard to the petitioners lands known as Aryapuram Thattimal Padugai Village, Papanasam Taluk, Tanjore District, and to quash the order therein.

The Special Government Pleader (*V. V. Raghavan*) on behalf of the Appellant in W.A. No. 39 of 1955 and for Respondent in W.A. No. 43 of 1955.

K. Rajah Ayyar and *R. V. Seshadri* for the 1st Respondent in W.A. No. 39 of 1955.

K. S. Desikan and *K. Raman* for the 2nd Respondent in W.A. No. 39 of 1955 and for Appellant in W.A. No. 43 of 1955.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These are two writ appeals from the Judgment of Rajagopalan, J., quashing the proceedings taken by the State of Madras under Madras Act XXX of 1947 with regard to the respondent's lands in Tanjore district. The Government proceeded on the basis that these lands fell within the definition of an estate contained in section 3(2) of the Estates Land Act, took action under Act XXX of 1947, and reduced the rents payable by the tenants on these lands. Rajagopalan, J., before whom the petition of the respondent under Article 226 of the Constitution came on for disposal, dealt with the question of fact whether the lands did or did not form an estate within the meaning of section 3(2) of the Estates Land Act, and in arriving at a conclusion on this question relied upon the statements in affidavits filed in the case and certain documents which were produced by the Government. The tenants who were vitally interested were represented by an advocate. The learned Judge on a consideration of some of the documents produced by the Government came to the conclusion that the grant was of portions of two villages and the lands did not constitute a whole village to satisfy the definition of section 3(2) (*d*). On this finding he allowed the petition and quashed the proceedings of the Government under Madras Act of 1947. Hence Writ Appeal No. 39 of 1955 by the Government and Writ Appeal No. 43 of 1955 by the tenants.

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* Writ Appeal Nos. 39 and 43 of 1955. 3rd September, 1956.

Before Rajagopalan, J., the learned Government Pleader urged that the question whether the lands belonging to the respondent constituted an estate need not be determined in writ proceedings and submitted that the learned Judge should refer the parties to a suit. The learned Judge confessed that in the normal course he would have exercised his discretion as suggested by the Government Pleader and referred the parties to a suit; but having regard to the fact that the proceedings had been pending in this Court for about 2½ years and because he thought that all the materials the parties were able to gather were placed before him, and because the question was argued at length, he was of opinion that he should not refer the parties to a suit. The learned Government Pleader once again pressed before us this aspect. We see considerable force in his suggestion. After listening to all that Mr. Raja Ayyar, learned counsel for the respondents could say in the matter, we are clearly of opinion that the just and equitable course from the point of view of all parties concerned would be to refer the aggrieved parties to a suit. In the first place we do not think that a writ petition should be converted into practically a original suit and questions of fact should be determined on a consideration of documentary evidence as in an original suit. In the second place the normal and more satisfactory course would be the institution of a suit in which the parties can adduce all available evidence and there would be a judicial consideration of all the evidence adduced and findings would be arrived at, which in their turn could be canvassed, if necessary, in a Court of appeal, if not in more than one Court. Article 226 of the Constitution cannot be invoked to convert a petition under it into a regular suit.

Without going into the merits, we allow the appeals and set aside the order of the learned Judge and refer the respondent, the aggrieved party, to a suit. There will be no order as to costs. Government shall waive notice under section 80 of the Code.

P.R.N. ——— *Appeals allowed—Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Ramaswamy Mudaliar .. *Petitioner**

Provincial Small Cause Courts Act (IX of 1887), *Schedule II, Article* 11—*Applicability—Sale of immovable property—Vendee dispossessed by person claiming title and obtaining decree in his favour—Suit for damages by vendee against vendor—Jurisdiction of Small Cause Court—Section* 25—*New plea—Section* 15 (3)—*Scope and effect of—Power of State Government to raise jurisdiction of Small Cause Court beyond Rs.* 1,000—*Madras Civil Courts Act, (III of* 1873), *section* 3 (a).

A suit for damages, being the price paid for the purchase of immovable property from the defendant, vendor, on the ground of the plaintiff having been dispossessed by the rightful claimant whose claim was recognised by a decree of Court, is not a "suit for the determination of enforcement of any other right to or interest in immovable property" within the meaning of Article 11 of the Second Schedule to the Provincial Small Cause Courts Act, and a Small Cause Court is not precluded from entertaining such a suit.

Tirupati Raju v. *Visan Raju*, (1896) I.L.R. 20 Mad. 155, and *Ayub Haji* v. *Jainuddin*, A.I.R. 1926 Bom. 362, distinguished.

A new point not raised either in the trial Court or in the grounds in the revision petition, cannot be permitted to be raised at the hearing of the revision petition under section 25, Provincial Small Cause Courts Act.

Obiter : Section 15 (3) of the Provincial Small Cause Courts Act does not operate to deprive the State Government of its power to raise the pecuniary jurisdiction of a Small Cause Court above Rs. 1,000. Section 3 (*c*) of the Madras Civil Courts Act saves the State Government's power, which remains unaffected by anything contained in the Provincial Small Cause Courts Act.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Cuddalore, dated 1st October, 1956 and passed in S.C.S. No. 251 of 1955.

R. Krishna Ayyar, for Petitioner.

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* C.R.P. No. 1570 of 1956. 7th December, 1956.

The Court delivered the following

JUDGMENT.—This is a revision against the decree passed by the Subordinate Judge of Cuddalore in S.C.S. No. 251 of 1955. The suit was for recovery of damages being the price paid for the purchase of property from the defendant, as he had been dispossessed by the rightful claimant, the claim being recognised by a decree of Court. This is a plain and simple suit for damages and the lower Court has given a decree in favour of the plaintiff. It is against that decree that this revision has been filed by the defendant.

The point that is raised before me, is that the Small Cause Court has no jurisdiction, because under Article 11 of the Second Schedule of the Provincial Small Cause Courts Act, IX of 1887, the Small Cause Court has no jurisdiction to entertain a suit of this nature. Article 11 of the Second Schedule is as follows :

> "A suit for the determination or enforcement of any other right to or interest in immovable property".

In plain language the suit must be one to determine the right or to enforce the right or interest in any immoveable property. In this suit there is no prayer to determine the right or enforce the right or interest in any immovable property. The right has been enforced and determined in the previous suit as a result of which this suit has been filed for damages. This does not therefore involve the determination or enforcement of any other right to or interest in immovable property. In support of his contention the learned counsel, who appears for the petitioner, relies on the decision in *Tirupati Raju* v. *Visan Raju*[1]. That is a suit where the land was compulsorily acquired under the Land Acquisition Act for the purpose of the East Coast Railway and the compensation was fixed at a certain amount. A conflict arose as to the right to receive the compensation and the District Court having declined to determine it under the Land Acquisition Act, section 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. A Bench of this Court consisting of Subramania Ayyar and Davies, JJ., held that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court. In my opinion this decision has no bearing on this case. The other decision that is relied upon by the learned counsel is *Ayub Haj* v. *Jainuddin*[2]. There the suit was for compensation for cutting the trees. It was a suit filed under Article 35 of the Second Schedule to the Provincial Small Cause Courts Act IX of 1887. Article 35 of the Second Schedule is as follows :

> "A suit for compensation (*a*) for loss occasioned by the death of a person caused by actionable wrong, (*b*) for wrongful arrest, restraint or confinement, (*c*) for malicious prosecution, (*d*) for libel (*e*) for slander, (*f*) for adultery or seduction, (*g*) for breach of contract of betrothal or promise of marriage, (*h*) for inducing a person to break a contract made with the plaintiff, (*i*) for obstruction of an easement or diversion of a water course . . . ."

I do not see how the compensation for cutting trees could ever fall under Article 35 of the Second Schedule and how that case has any bearing on this case. The contention of the learned counsel for the petitioner that the Small Cause Court has no jurisdiction to entertain the suit under Article 11 or Article 35 of the Second Schedule of the Act fails.

Another point that was not taken in the trial Court at all but is taken here for the first time in this Court. That is the Madras Government has no jurisdiction to raise the pecuniary jurisdiction of the Small Cause Court to a sum above Rs. 1,000 as under section 15(3) of the Provincial Small Cause Court Act no provincial Government shall enhance the pecuniary jurisdiction of the Court above Rs. 1,000. A Provincial Small Cause Court Act is an Act of 1887, whereas the Civil Courts Act of the State is one of 1873. Under section 3 (*c*) nothing contained in the Provincial Small Cause Court Act should be construed to affect any local law or any special law other than the Code of Civil Procedure. Therefore, what is contained in the Provincial Small Cause Court Act of 1887 does not affect the power that is given to the local Government to raise the jurisdiction. As already pointed out, this point was not taken in the trial Court. In the grounds in the petition also it has not been taken in this form. It is said to be covered by the general ground that the decision of the trial Court is without jurisdiction. It need hardly be stated that this is an after-thought for the purpose of getting this revision petition admitted. I do not find any substance in it. The Civil Revision Petition is dismissed.

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[1] (1896) I.L.R. 20 Mad. 155.

[2] A.I.R. 1926 Bom. 362.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

M. K. Ranganathan and another .. *Petitioner**

v.

A. S. Jaffers and another .. *Defendants.*

Madras Court Fees and Suits Valuation Act (*XIV of* 1955), *section* 73—*Scope—Powers of Government to remit court-fees—Extent of—Notification remitting fees and charges payable by ex-workmen of Madras Electric Tramways, Ltd., on plaint, application, on vakalatnama, and on process, etc., for recovery of amounts payable under Award of Industrial Tribunal—Validity and effect—Suit in High Court for declaration of right to certain amount and for injunction—Liability to court-fee—Power to remit process fee on Original Side of High Court—Power of Government to "dispense" with the law.*

Section 73, Madras High Court Fees and Suits Valuation Act, 1955, does not empower the Government to remit the fees payable by a particular individual in a particular case. The Government can in appropriate cases, no doubt, remit the fees payable by a class of people. But a classification must be reasonable and must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be achieved and it must not be arbitrary. Before a classification can be upheld as reasonable and just, it must be possible to discover some reasonable foundation for it. The former workmen or employees of the Madras Electric Tramways, Ltd., cannot be described as a class. The Government cannot exempt certain individuals, because it pleases them to do so. Therefore, a notification issued by the Government under section 73, Madras Act XIV of 1955, remitting all the fees chargeable under the said Act on any plaint, application or other legal proceedings, on vakalatnama and on process that may be filed or taken in a civil Court by or on behalf of any former workman or workmen of the Madras Electric Tramways, Ltd., for the recovery of the amounts due under the Award etc., cannot be held to be a valid notification. Such a notification is *ultra vires* the powers of the State Government under section 73 of the Act.

Process-fees on the Original Side of the High Court are not collected under the Court-fees Act and therefore the notification which seeks to exempt a plaintiff from the payment of such process fees must fail on that ground also. Nor would section 80 of Madras Act XIV of 1955 be of any avail, as it does not touch the process-fees payable on the Original Side of the High Court.

A suit for a declaration of a right to be paid a certain amount and injunction cannot be said to be a suit for the recovery of any amount within the meaning of the notification. What the Government really sought to do by the notification was to " dispense " with the law in the case of a particular plaintiff, which the Government has no power to do. Though the State Government is an important part of the machinery set up by the Constitution and is undoubtedly vested with very large powers, it is not sovereign in any sense of the word known to jurisprudence and its powers are not without limits or boundaries, and it cannot " dispense " with the law.

Suit for (1) declaring the right of the workmen including the plaintiffs (who were all employees of the Madras Electric Tramways (1904) Ltd., as on 11th April, 1953) to be paid the sums due to them under the reliefs granted to them by the modified award (and aggregating to Rs. 80,43,53-5-0) out of the said proceeds in the hands of the defendant representing the realisation made by him of the assets and properties of the said company, (ii) restraining the defendant by a permanent injunction from wasting, damaging, alienating, dealing with or disposing of or removing or transfering from the jurisdiction of this Court, the said proceeds until and unless the workmen of the Company as on 11th April, 1953 have been paid out the various sums due to them under the modified award ; and (iii) directing the defendant to pay to the plaintiffs the costs of this suit.

Mohan Kumaramangalam and *R. Venkataraman* for *Messrs. Row and Reddy*, Advocates for the Plaintiffs.

O. T. G. Nambiar for *S. Krishnaswamy Iyer*, Advocate for the Defendant.

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*Diary No. 3436 of 1956. 11th December, 1956.

The Court delivered the following

ORDER.—Two former employees of the Madras Electric Tramways Ltd., in liquidation, claiming to represent themselves and all the other former workmen of the company numbering some 1,611 persons, sought leave to file a suit *in forma pauperis* to obtain various reliefs against the receivers appointed by the trustees of the mortgagee-debenture holders of the company.

Now, it has been held in this Court that a representative suit cannot be filed *in forma pauperis* unless all the persons sought to be represented are without the means to pay the prescribed Court-fee. I take it that it must have been difficult to prove that every one of the 1,613 persons, for whose benefit the suit is sought to be filed, is so circumstanced. So the Secretary of the Madras Electric Tramways Workers' Association appears to have invoked the assistance of the State Government and on 23rd March, 1956, the Government issued the following notification :

> "In exercise of the powers conferred by section 73 of the Madras Court-fees and Suits Valuation Act, 1955 (Madras Act XIV of 1955), the Governor of Madras hereby remits all the fees chargeable under the said Act, on any plaint, application or other legal proceedings, on vakalatnama and on process that may be filed or taken in a civil Court by or on behalf of any former workman or workmen of the Madras Electric Tramways Limited, for the recovery of the amounts due under the Award passed by the Special Industrial Tribunal, Madras, as modified by the Labour Appellate Tribunal of India".

When a copy of this notification was placed before me, I entertained doubts about its validity, and so, on 10th April, 1956, I directed the office to number the plaint provisionally subject to the question being fully argued and decided later. It was also made clear to Mr. Mohan Kumaramangalam, the learned advocate for the plaintiffs, that should this question be finally decided against the plaintiffs, and the requisite Court-fee be not paid, the plaint would be rejected.

The question has since been argued.

One matter of subsidiary importance may be at once disposed of. The notification, it is seen, purports to exempt the former workmen of the Madras Electric Tramways, Ltd., from the payment not merely of Court-fees but also of process fees. Now, process fees on the Original Side of this Court are collected not under the Court-fees Act of 1955 but under different provisions. Section 80 of the Court-fees Act of 1955 which is the only provision in the Act applicable to process fees levied by Court does not touch the process fees payable on the Original Side of this Court. Clause (*a*) of sub-section (1) of that section deals only with

> "the fees payable for serving and executing processes issued by the High Court in its *appellate* jurisdiction and by the civil and criminal Courts subordinate thereto".

The notification in the present case has been issued under section 73 of the Act which in terms deals with the fees chargeable under the Act. The notification, therefore, must fail so far as it seeks to exempt the plaintiffs from the payment of the process fees to which they are liable under the law.

Mr. O.T.G. Nambiar, the learned advocate for the receivers appointed by the trustees of the mortgagee-debenture-holders raised another point. He remarked that proceeding for the moment on the assumption that the notification is valid, it can be of no assistance whatever to the plaintiffs in the action now proposed. His argument was this. The notification exempts the former workmen of the Madras Electric Tramways Ltd., from the payment of Court-fee on any plaint, application or other legal proceedings taken in a civil Court—now come the words which are material—

> "for the recovery of the amounts due under the award passed by the Special Industrial Tribunal, Madras, as modified by the Labour Appellate Tribunal of India."

The exemption has been granted only in respect of a suit instituted for the recovery of the amounts made payable by the Tribunals mentioned. In the present suit there is no prayer for the recovery of any amount. The prayers of the plaintiffs are contained in paragraph 16 of the draft plaint. Their first prayer is for a judgment.

> " declaring the right of the workmen . . . . to be paid the sums due to them under the reliefs granted to them by the modified award . . . . ."

The second prayer is for an injunction restraining the defendant from disposing of or removing from the jurisdiction of this Court certain moneys. The third prayer is for costs. There is no prayer for the recovery of any amount from any person. The objection is not merely technical because it cannot be got over by amending the plaint. If the plaintiffs now seek to amend the plaint by adding a prayer that the workmen concerned be paid various amounts, then they would be up against the difficulty that they cannot have a single suit. Every person affected must file a separate suit for the amount which he claims is due to him. This objection is probably very sound.

However since an attempt may be made to amend the plaint to obtain the benefit of the notification the further question must be considered how far is the notification valid.

Court-fees in this State are now collected on the strength of an enactment made by the local legislature and numbered as Act XIV of 1955. Section 4 of the Act provides that no document which is chargeable with fee under the Act shall be filed or exhibited or recorded or acted on in a Court unless the appropriate fee has been paid. There is a proviso relating to criminal Courts, which is not of present interest. Then follow various sections directing how the fees shall be computed in the various categories of cases dealt with by the Act. Chapter VII which contains sections 66 to 73 deals with refunds and remissions and exemptions. In section 72 the legislature has enumerated twenty different types of instruments which are exempt from the payment of any fee. Then follows section 73 which empowers the State Government to reduce or remit fees in certain cases. That section runs as follows :—

> " The State Government may, by notification in the *Fort St. George Gazette*, reduce or remit in the whole or in any part of the territory of this State, all or any of the fees chargeable under this Act, and may, in like manner, cancel or vary such notification."

It will be seen that this section empowers the Government to reduce or remit the fees payable, in the whole of the State or any part of the State. That power may be exercised in relation to all the fees chargeable under the Act or any of the fees chargeable under the Act. That is to say, under this section the Government can remit or reduce the fees payable on every class of instrument throughout the whole of the State. Similarly they can reduce or remit the fees payable on every class of instrument over certain portions or areas of the State. Likewise they can remit or reduce the fees payable on certain types of instrument either in the whole of the State or part of the State. But, as I read the section it does not empower Government to remit the fees payable by a particular individual in a particular case. Section 73 of Madras Act XIV of 1955 is a copy of section 35 of the Court-fees Act of 1870 with only one variation which is now immaterial. Some of the notifications issued under the old Act have been collected in the Guide to the Law of Court-fees, Madras, by Krishnamurthi and Mathrubutham. Those exemptions are all of them general in character, and, I have not been shown a single case under the old Act in which Government sought to exempt a particular individual in a particular case from liability to pay the fees under the Act.

Mr. Mohan Kumaramangalam handed to me copies of two notifications issued by the Government of Madras under Act XIV of 1955. They are G.O. Ms. No. 332, Home, dated 31st January, 1956 and G.O. Ms. No. 1897, Home, dated 2nd July, 1956. The former is general in character and applies to all individuals and does not confer a favour on any particular person. The latter deals with Village Officers generally and again is not in relation to an individual case. I am not concerned to investigate whether the exemption granted therein to Village Officers is good or bad, it is sufficient to say that the notification deals not with any particular individual but with a category of officers.

Mr. Kumaramangalam argued that under section 73 the State Government have power to remit the fees payable by a class of people, and, that in the present case, the class is the class of ex-employees of the Madras Electric Tramways Ltd. There is no need here to question the correctness of the contention of Mr. Kumaramangalam that the Government can, in appropriate cases, remit the fees payable by a class of people. For example, if a particular area is affected by drought or is damaged by cyclone or other natural visitation, it may be open to Government to say that people living in that area are exempt from the payment of the fees payable under the Act in respect of all or specified matters. But, I find it difficult to see how the former employees of the Madras Electric Tramways Ltd., can be described as a class. Every classification must be a reasonable one. It must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and, the classification must not be arbitrary. If the Government had said that they exempted from the payment of Court-fee all persons whose incomes are below a certain limit that would be intelligible. If they had said that they exempted from the payment of Court-fee all those who have been unemployed for a certain period that also would be understandable. If they had said that they exempted from the payment of Court-fee all persons who are engaged in any hazadous enterprise that also could probably be justified. But, this is not what the Government have now done. They exempt certain individuals because it pleases them to do so. It will be noticed that they do not exempt the ex-employees of the M.E.T. from the payment of all fees payable under the Court-fees Act; they exempt them from the payment of fees payable in this particular case. I do not see how such an order can be upheld as based on any classification at all. On this basis there can be as many classes as there are individuals who please Government. Before a classification can be upheld as reasonable and just it must be possible to discover some reasonable foundation for it. I am unable to discover any in the present case. As I read the Act Government have no power to say that they exempt a particular individual from payment of fees in a particular case. The section does not purport to enable the Government to do that, and, if it did, its constitutional validity would be open to argument.

It is not difficult to visualize the situation into which one would be forced if this notification were to be held good. In this particular case Government proceed to exempt the ex-employees of the M.E.T. Ltd., from paying the fees they are liable to pay under the Act. If the Government can validly do this now they can also validly excuse from the payment of all fees chargeable under the Act individuals who profess a particular political creed or who make themselves useful to the Government or who otherwise happen to please them. And, the mischief may not stop with the Court-fees Act. Section 6 of the General Sales Tax Act confers power on the Government by notification to grant exemptions and reductions in respect of taxes payable under that Act. It is probable that other fiscal statutes contain similar provisions. By exercising the powers conferred by these provisions, individuals favoured by the Government can be excused from the payment of various public dues. It may be said that such things will not be done, but I do not have that confidence. In what are called democratic forms of Government administrative processes are peculiarhy susceptible to stresses and influences seeping from the electoral arena. To resist them requires a strong moral fibre and that is not a common virtue.

If we give thought to the matter, it will be realised that what the Government are really seeking to do is to "dispense" with the law in the case of the plaintiff. In effect and substance the Government are telling that the plaintiffs are excused from the operation of the law in this particular case. My reading of English Constitutional History tells me that the last English King who claimed to exercise the power of "dispensing" with the law was James II, and, that after he fled the country, Parliament solemnly put it on record that the pretended power of the King to "dispense" with the law did not exist.

When we speak of the Government of a State in the Indian Union we really mean the executive authority of the State. Its powers are undoubtedly very large; but they are not without limits or boundaries. The Government of the State is an important part of the machinery set up by the Constitution, but, it is not sovereign in any sense of the word known to Jurisprudence and it cannot dispense with the law. Time was when Rex was Lex. We now seek to say that Lex is Rex. The Government is neither Rex nor Lex.

In my judgment the notification is null and of no effect.

Time to pay Court-fee, one month.

P.R.N. ——— *Notification declarednull and void.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The Oriental Government Security Life Assurance Company, Ltd., Bombay, with its Agency Office at Cantonment Tiruchirapalli .. *Petitioner**

v.

B. S. Krishnamurthi .. *Respondent.*

Insurance Act (IV of 1938) *as amended, section* 44 (1) (b)—*Scope—Insurance agent ceasing to do insurance work—If should keep his license alive year after year to get the percentage on renewal premiums to which he is entitled under section* 44 (1) (b) *or* (c).

Where the aggregate amount of the insurance policies effected through an insurance agent in force on a date one year before his ceasing to act as such agent, amounted to only Rs. 49,500, such an agent would not be entitled to his commission on the renewal premium. The natural interpretation of section 44 (1) (*b*) can only be that policies more than Rs. 50,000 in value should have been in force on the specified date.

It is not necessary that an insurance agent who has ceased to do insurance work should keep his insurance license in force year after year, in order to earn the percentage on the renewal premiums even if he is entitled to it under section 44 (1) (b) or (c).

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tiruchirapalli, dated 21st June, 1954 and passed in S.C.S. No. 420 of 1953.

R. Narasimhachari for Petitioner.

T. R. Srinivasa Ayyangar for Respondent.

The Court delivered the following

JUDGMENT.—This is said to be a test case to get a ruling on a point not covered by rulings so far. This is a petition originally filed by the Oriental Government Security Life Assurance Company Limited, whose place has been taken now by the Life Insurance Corporation of India on nationalisation, for revising and setting aside the decree and judgment of the Additional Subordinate Judge, Tiruchirapalli, in S.C.S. No. 420 of 1953, granting a decree for Rs. 385 alleged to be the percentage commission due to the plaintiff Krishnamurthi, an insurance agent, from the petitioner in respect of the renewal of premia on policies effected through his agency between 21st April, 1944 and 14th December, 1950, under section 44 (1) (*b*) of the Insurance Act.

The facts are briefly these: The plaintiff Krishnamurthi was an insurance agent under the Oriental Government Security Life Assurance Company for more than five years and less than ten years and ceased to be such agent on 14th December, 1950. According to him he had secured policies for Rs. 54,500 which were in force within two years before his ceasing to be agent. One policy for Rs. 5,000 out of the above policies lapsed for non-payment of premia on 21st May, 1949, that is, *more than one year* before he ceased to be agent but *within two years* before he ceased to be agent. In other words, this policy lapsed after this agent had received when he was in service, the percentage on the renewal premia for the previous year. The question for determination before the lower Court was whether under section 44 (1) (*b*) of the Indian Insurance Act, as amended he could claim the 4 per cent. on the premia (on the policies in force on 14th December, 1949) allowed thereunder, though the policies in force then aggregated only to Rs. 49,500. Section 44 (1) (*b*) of the Indian Insurance Act, as amended, runs as follows :

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*C.R.P. No. 1539 of 1954. 18th December, 1956.

> "Such agent has served the insurer continually and exclusively in respect of life insurance business for at least five years and the policies assuring a total sum of not less than Rs. 50,000 effected through him for the insurer were in force *on a date one year before his ceasing to act as such agent*, for the insurer and that the commission on renewal premiums due to him does not exceed 4 per cent. in any case."

It may also be useful to extract section 44 (1) (*c*) as amended, in this connection. It runs as follows :

> " Such agent has served the insurer continually and exclusively for at least ten years, and after his ceasing to act as such agent he does not directly or indirectly solicit or procure insurance business for any other person."

It will be noticed that section 44(1) (*c*) differs from section 44 (1) (*b*) in three respects. Firstly, an insurance agent who has served exclusively for at least ten years is entitled to the percentage on the renewal premium, irrespective of whether or not policies assuring *a total sum of not less than* Rs. 50,000 were effected through him for the insurer. Secondly, he is entitled to such percentage on the renewal premium *irrespective of the fact whether they were in force on a date one year before his ceasing to act as agent* for the insurer. Thirdly, he is under a disability as against an insurance agent who had worked only between five years and ten years, in that he could not claim the percentage on the renewal premium, if he directly or indirectly solicited or procured insurance business for any other person after he ceased to be an insurance agent for the particular company. Of course, these provisions, even as amended, were enacted before the nationalisation of the insurance companies, and at a time when a former agent of one insurance company could work for a rivial company and ruin the prospects of the former insurance company.

I cannot agree with Mr. Narasimhachari, the learned counsel for the petitioner, that section 44(1) (*c*) contemplates persons considered to be *retiring* after a service of ten years. In no civilised country in the world does any person *retire* in less than 25 years of service and in some countries, he does not retire till he has completed 35 years of service. I take it that the Legislature simply made an arbitrary distinction between people who had served for at least five years and not more than ten years, and people who had served for at least ten years, something like the distinction between first class and second class passes in examinations, each University fixing a percentage, according to its own will and pleasure for first class and second class.

It was urged for the plaintiff-respondent in the lower Court that the clause " were in force on a date one year before his ceasing to act as such agent for the insurer " should not be construed *literally*, as policies in force on 14th December, 1949 in this case, but should be given *a liberal interpretation* and held to mean policies which were in force after the payment of the percentage on the renewal commission for the previous year. The lower Court accepted that contention, and rejected the contention of the petitioner's counsel that the clause should be strictly construed and only policies in force on 14th December, 1949 should be considered, and that if they fell below the value of Rs. 50,000 the plaintiff would not be entitled to any percentage on the renewal premia. It mentioned an anomaly and a hardship, if the petitioner's construction were accepted, namely that if the total value of the insurance policies effected through the plaintiff amounted to more than Rs. 50,000, on 14th December, 1949, the plaintiff could go on drawing the percentage on the renewal premia on subsisting policies for years, in spite of the fact that shortly thereafter (say, even a day thereafter) policies of the value of Rs. 5,000 or even more ceased to be in force. It considered that the plaintiff-respondent should not be punished for no fault of his, and that it was not proved that, in this case, the policy for Rs. 5,000 had lapsed for non-payment of premium due to the plaintiff's fault, or even absence of effort. It considered that Rs. 385 claimed by the plaintiff as his 4 per cent. on the renewal premium paid for the policies in force on 14th December, 1949 (Rs. 49,500) should be paid to the plaintiff. It also rejected the contention raised by the petitioner's counsel before it that Rs. 57-6-0, out of Rs. 385 claimed by the plaintiff, should be disallowed, as the plaintiff's licence as insurance agent had expired on 24th March, 1951 and as a man having no licence in force should not be allowed to draw the percentage on the renewal premiums. In the end, it decreed the suit with cost.

I have perused the entire records, and heard the learned counsel on both sides. Mr. Narasimhachari learned counsel for the petitioner, pointed out, that under the old law, an agent, who had retired, was not given any percentage on the renewal premium since the *raison d'etre* for paying him the percentage is *servicing of the Policies* and *keeping them alive* by contacting the policy holders, and making them pay up in time, and that is only by the amendment that insurance agents who have retired are given a percentage in the renewal premium, subject to the conditions imposed by section 44 (1) (*a*) (*b*) and (*c*). It is interesting as *ancient history* of the law in the past but I do not think that it is material for the purpose of deciding our case. In India after independence new laws have sometimes little connection with the old laws (take the Estates Land Act) for instance and amendments are made without caring over much for continuity, probably because the old laws are not supposed to be so good as to deserve such continuity.

But I agree with Mr. Narasimhachari regarding the construction he put on the clause 'in force on a date one year before his ceasing to act as such agent for the insurer, namely, that unless policies secured by the plaintiff to the tune of more than Rs. 50,000 *were in force* on 14th December, 1949, he would not be entitled to any percentage on the renewal premium, and that the lower Court went wrong in its refusing to accept this interpretation and putting the extended (and so called *liberal*) interpretation mentioned above. Mr. Srinivasa Ayyangar for the plaintiff-respondent, merely urged that the interpretation sought to be put on it by Mr. Narasimhachari was harsh and would lead to hardship to poor people, like the plaintiff, with small means. I do not think that *hardship* can be considered at all under our law, in justice or in equity, when there is *no legal basis* for relieving a person from that hardship. Law previails over equity where they conflict. The natural interpretation of the clause can only be that policies more than Rs. 50,000 in value effected by the insurance agent should have been in force on a date one year before he ceased to be agent in this case on 14th December, 1949. Mr. Srinivasa Ayyangar asked whether it could not be urged that it would be *intolerable hardship* if, just, one day before 14th December, 1949, the policies fell below the fixed mark of Rs. 50,000 by even Rs. 50—or Rs. 100. But that is not a point which the law can relieve against. A man getting only 39 per cent. instead of the fixed 40 per cent. for a pass in examination, cannot complain of *intolerable hardship* if he is failed for the sake of one mark. That is based also on sound reason. If one mark can be relieved against, the next man who got one mark less than the man relieved should also be passed, and then the next, and then the next, and finally the man who got zero should be passed. Some arbitrary rule of thumb figure is fixed in cases of examinations, commissions, etc., and cannot be avoided, if the affairs of men are to be conducted speedily and sensibly. Mr. Srinivasa Ayyangar urged that the lower Court took the date of the previous payment of the percentage on the new premium and that there was some reasonableness in it. But, when the law is clear, mere reasonableness has little force when urged against it, unless the terms of the sections support the alternative interpretation sought for. The Officer paying a percentage not due will be sur-charged. Here, the section does not support the lower Court's interpretation. Nor can the fact that an insurance agent with less than ten years or more than five years of service draws commission on the polices in force for years on end, if only policies of the value of more than Rs. 50,000 (though it falls below that figure *one day later*) were in force on a date one year before he ceased to be agent, though it falls below that figure one day later be urged as a ground for relaxing the interpretation and making it broader. The law must prevail. It follows that the lower Court's judgment and decree were *wrong* and that the plaintiff was not entitled to anything whatever as percentage on the renewal premia in view of the provisions of section 44 (1) (*b*) as amended.

I cannot, however, agree with Mr. Narasimhachari that the lower Court went wrong in rejecting the defendant's contention under section 40. In my opinion it is against sense and commonsense alike that an insurance agent who has ceased to do insurance work should keep his insurance licence in force *year after year* by paying the insurance fee, in order to earn the percentage on the renewal premia, even if he is entitled to it under section 44 (1) (*b*) or (*c*). It will be something like asking a pensioned driver of a motor vehicle to keep his driving licence in force, if he wishes to draw the pension, though he does not drive any car or vehicle or has anything to do with it. Such a proposition will only help the Government or other authorities, in getting licence fees for no purpose at all, and cannot be countenanced by Courts. So, I agree with the lower Court's finding on this point. But, in view of my finding in favour of Mr. Narasimhachari's contention on the first point, I set aside the judgment and decree of the lower Court and dismiss the suit. In the circumstances, I direct all the parties to bear their own costs throughout.

V.S. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Criminal Revisional Jurisdiction].

PRESENT :—MR. JUSTICE SOMASUNDARAM.

V. S. Ramanathan .. *Petitioner**.

Criminal Procedure Code (*Act V of* 1898) *as amended by Act XXVI of* 1956, *sections* 173, 251-*A*—*Scope*—*Prosecution if can examine witnesses not disclosed in the charge-sheet*—*Discretion of Court under section* 540 *to examine such witnesses as Court witnesses.*

In the trial of warrant cases a new procedure has been prescribed by sections 173 (4) and 251-A of the Criminal Procedure Code with regard to cases in which the Police charge-sheets under section 173 (1) of the Code.

The prosecution must decide before the commencement of the inquiry what witnesses it proposes to examine in support of its case and mention their names in the charge-sheet that is filed under section 173, Criminal Procedure Code and furnish or cause to be furnished copies of statements of those witnesses recorded under section 162, Criminal Procedure Code. If this is not done the prosecution has no right to call any witness they like subsequently and spring a surprise on the accused. The provisions of the Criminal Procedure Code as now amended have to be strictly construed and not in any manner which is likely to derogate from the rights conferred on the accused.

The Court may in the exercise of its judicial discretion examine such witnesses as Court witnesses under section 540, Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the IV Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras, dated 25th May, 1956 and made in C.C. No. 12350 of 1955.

S. Govindswaminathan for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—The accused in C.C. No. 12350 of 1955 on the file of the IV Presidency Magistrate is the petitioner herein. The circumstances under which this Criminal Revision Petition is filed are these :—

On 1st December, 1955 the City Police filed a charge-sheet against the petitioner, that is, the accused in the above case for an offence under section 420, Indian Penal Code. The accused appeared on 12th March, 1956. The case was adjourned to 17th March, 1956 for furnishing to the accused copies of documents referred to in section 173 (4) of the Criminal Procedure Code. No documents were furnished on the

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* Crl.R.C. No. 540 of 1956. 26th October, 1956.
(Crl.R.P. No. 498 of 1956).

17th and so the case was adjourned to 20th March, 1956 when copies of certain documents alone were made available to the accused. On the 20th after hearing the prosecution and the counsel for the accused a charge was framed for an offence under section 420, Indian Penal Code without examination of any of the witnesses cited in the charge-sheet. The accused pleaded not guilty to the charge and then the case stood adjourned to 3rd April, 1956 for examining witnesses on the prosecution side. In the charge-sheet only four witnesses were examined. They were (1) Parmar; (2) Chandra; (3) Rajagargh and (4) Venugopal. On 3rd April, 1956, P.W. 1 (that is, the first mentioned witness in the charge-sheet) the complainant in the case was present, but as he did not know any language other than Gujarathi, the case was adjourned to 4th April, 1956, for getting a Gujarathi translator. On 4th April, 1956 with the assistance of the Gujarathi interpreter of the High Court, P.W. 1 was examined and Exhibits P-1 to P-17 were marked. On the the same day Rajagargh, the third mentioned witness in the charge-sheet was given up by the prosecution and an additional list of witnesses was filed for whom the Magistrate directed issue of summons. The case then stood adjourned to 17th April, 1956. On 17th April, 1956, as no witness turned up, fresh summons were ordered to all the witnesses except to N.C. Chandra the second mentioned witness in the charge-sheet. He was directed to be examined on commission. The case was again adjourned to 27th April, 1956. This Court in Crl.R.C. No. 466 of 1956 quashed the order of the Magistrate directing the examination of Chandra on commission, for the reasons mentioned therein. The case underwent several adjournments and stood finally posted to 10th May, 1956 for examination of witnesses mentioned in the additional list filed on 4th April, 1956. The names of witnesses mentioned in the additional list and who were sought to be examined were Jadawla, Mathurdoss, Thakore and Narayan Nair. Among these additional witnesses to be examined the first mentioned witness, Jadawla was given up. The second mentioned person Mathurdoss was examined as P.W. 2 on 10th May, 1956 and Exhibits P-18 to P-23 were marked. The case was then adjourned to 23rd May, 1956 when the third and the fourth witnesses mentioned in the list, Thakore and Narayan Nair were examined as P.Ws. 3 and 4 and Exhibits P-24 to P-31 were marked. On the same day, that is, on 23rd May, 1956 the prosecution filed another list of witnesses and asked that summons should be issued to them. The witnesses sought to be summoned are Narayan Rao and Chittibabu. The accused raised an objection to the examination of these additional witnesses but his objection was overruled and it is against this order of the lower Court rejecting the objection of the accused to the examination of the additional witnesses whose names were furnished on 20th March, 1956, that the present revision case has been filed. It is alleged and conceded by the prosecution that these two witnesses, *viz.*, Narayana Rao and Chitti Babu were not examined by the police during the investigation and that, therefore, no statements were recorded from them under section 161 (3) of the Criminal Procedure Code.

So far as P.Ws. 1 to 4 are concerned, it is alleged that copies of statements of P.Ws. 1 to 3 recorded under section 162 of the Criminal Procedure Code were granted to the accused but that no copy of the statement of P.W. 4 was furnished. P.W. 4 is one of the investigating officers in the case. He would not have been examined in the case and any statement of his can only be with regard to his conclusions on his investigation into the case. As it can only be in the nature of an opinion copy of this document need not be furnished to the accused; but as regards P.Ws. 1 to 3 copies of their statements under section 162, Criminal Procedure Code have been given to the accused and therefore no question arises about them. It is only with regard to the last two named witnesses who were sought to be examined by the additional list filed on 20th March, 1956, objection is taken to their examination. It is alleged and it is not disputed that P.Ws. 1 to 4 do not connect the accused with the crime charged against him and it is only by the examination of the last mentioned witnesses that the accused is sought to be connected with the offence. The question is whether in these circumstances the two witnesses whose names have been furnished in the list filed on 20th March, 1956 could be allowed to be examined by the prosecution. This question would not have presented any difficulty before the amendment of the Criminal

Procedure Code by Act XXVI of 1955. The Criminal Procedure Code has been amended by the above mentioned Act with a view to facilitate expeditious disposal of cases. In an attempt to achieve this object the interest of the accused has not been overlooked. Very many important changes have been introduced in the matter of procedure to be followed in the inquiry before committal and in the trial of warrant cases.

In the trial of warrant cases with which alone we are concerned at present, a new procedure has been prescribed with regard to cases in which the police file charge-sheets under section 173 (1) of the Criminal Procedure Code. This is laid down in section 173 (4) and section 251-A of the Criminal Procedure Code. Section 252 lays down the procedure with regard to trial of warrant cases which are instituted other than on police reports. In cases where the police file charge-sheets under section 173 (4) of the Criminal Procedure Code a duty is cast on the prosecution to furnish or cause to be furnished to the accused copies of documents mentioned therein free of cost before the commencement of the inquiry or the trial. Most of the documents referred to in section 173 (4) including the statements and confessions recorded under section 164 of the Criminal Procedure Code were, before the amendment of the Code, furnished to the accused only on application and on payment of the necessary cost by him. As regards 162 statements, they were granted to the accused only after the witnesses were put into the witness-box and that too only on application by the accused. By the present amendment this obligation on the part of the accused to apply for copies of these documents is dispensed with. The Legislature has enjoined on the prosecution to furnish copies of the statements and the other documents free of cost to the accused and that too before the commencement of the inquiry or trial. Further before the Criminal Procedure Code was amended by Act XXVI of 1955 the accused had a right to cross-examine the witnesses before a charge was framed against him to and also after the framing of the charge. This double right to cross-examine the prosecution witnesses has now been taken away by the above amendment in respect of cases instituted on police reports though that right is still retained with regard to cases instituted other than on police reports. This case being a police charge-sheet case the discussion will be confined only to this class of cases. Prior to the amendment of the Criminal Procedure Code in such cases the accused had a right to reserve cross-examination of witnesses till after the charge was framed but the charge itself was framed only after the examination of all or some of the witnesses for the prosecution. It may even be after the examination of one witness but under no circumstances can a charge be framed without the examination of any of the witnesses. In short, the accused was made aware of the case against him by the evidence of important witnesses given in Court which enabled him to prepare his defence. The accused thus had a picture of the case against him and his right to further cross-examine witnesses was exercised to meet such a case and in support of his defence. Now under clause (3) of section 251-A of the Criminal Procedure Code without examining any of the witnesses and without recording any evidence, the Magistrate may frame a charge against the accused merely on a consideration of the documents referred to in section 173 of the Code and after giving the prosecution and the accused an opportunity of being heard. In the place of evidence which formerly must be given in Court and which was subjected to cross-examination before the framing of the charge, the Legislature has enjoined on the prosecution by the provisions of section 173 (4) of the Criminal Procedure Code to furnish or cause to be furnished to the accused copies of document referred to therein before the commencement of the trial or the inquiry as the case may be. Not only is this duty cast on the prosecution but there is a further obligation cast on the Court to satisfy itself that copies of documents referred to in section 173 (4) of the Criminl Procedure Code have been granted and if not the Magistrate shall cause them to be furnished to the accused. Furnishing copies of these documents prior to the comencement of the trial or the inquiry is thus ensured. By this procedure even before the commencement of the trial the accused is given an opportunity of knowing the entire case against him which will enable him to defend his case properly. This provision of directing copies of documents referred to in section 173 to be furnished to the accused before the commencement of the trial is a compensation as it were for taking away the right which the accused enjoyed before the amendment of the Code. This advantage which the Legislature has in its wisdom thought fit to confer on the accused as compensation for the deprivation of the right which he enjoyed before, cannot in any manner, be whittled down. This advantage is really a right conferred on the accused by the statute and no one has any right either to deprive the accused of that right or undermine it or water it down in any manner under the guise of exercising some other power under the Code. The provisions of the amended Code referred to above, have therefore to be strictly construed and not in any manner which is likely to derogate from the rights conferred on the accused.

Let us now examine and see whether what is sought to be done by the prosecution is justifiable. From the facts set out earlier it would be seen that when the charge-sheet was filed on 1st December, 1955 only four witnesses were cited including the investigating officer. That means that the prosecution had decided to establish its case against the accused by the evidence of these four witnesses only. Statements of three of these four witnesses recorded under section 162 of the Criminal Procedure Code must therefore be granted to the accused before the commencement of the trial. So far as the first mentioned witness in the charge-sheet is concerned, a copy of his statement under section 162 of the Criminal Procedure Code was furnished to the accused and he was examined as P.W. 1. Regarding the second mentioned witness in the charge-sheet, as he was the complainant in a similar case against the accused, copy of his statement in the other case was given to the accused. There is no suggestion that he was separately examined under section 162 of the Criminal Procedure Code in the present case. Therefore, furnishing copies of statements under section 162 of the Criminal Procedure Code in the other case will suffice. The examination of this witness on commission in the present case was dispensed with by the order of this Court already referred to and, therefore no question of non-supply of copies of the statement of this witness under section 162 of the Criminal Procedure Code arises. As regards the third mentioned witness in the charge-sheet, Rajagargh, it is not clear whether a copy of his 162 statement was furnished or not to the accused before the commencement of the inquiry. This witness was given up by the prosecution on 4th April, 1956. As Rajagargh was mentioned as a witness in the charge-sheet, and as there was no knowing that he would not be examined, a copy of the statement under section 162 of the Criminal Procedure Code should have been granted to the accused before the commencement of the enquiry and if it had not been granted it is a violation of the mandatory provision of the Code and a breach of the duty cast not only on the prosecution but also on the Court. On 4th April, 1956 apparently after the examination of P.W. 1 an application was filed for the examination of four more additional witnesses by the prosecution. They were not cited in the charge-sheet. This was the first assault on the right of the accused to know before the commencement of the enquiry not only the names of the witnesses but also to have copies of the 162 statements of these witnesses. Of the four witnesses mentioned in the additional list filed on 4th April, 1956 the first mentioned, namely, Jadawla was given up. The other three witnesses were examined on 10th May, 1956 and 23rd May, 1956 as P.Ws. 2, 3 and 4. Copies of their statements under section 162 of the Criminal Procedure Code were granted to the accused before their examination. It is not known as to why these witnessses were not cited in the charge-sheet if they were material witnesses. It is not open to the prosecution to spring such surprises on the accused by bringing in witnesses who were examined during the investigation without citing them as witnesses in the charge-sheet. According to the provisions of section 173 of the Criminal Procedure Code statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses must be furnished to the accused before the commencement of the inquiry. The question is, did the prosecution propose to examine these four witnesses whose names were mentioned in the additional list filed on 4th April, 1956. If they did not propose to examine those persons as their witnesses, the prosecution should not have examined them afterwards. If they had proposed to examine them as their witnesses, not only should their names have been mentioned in the charge-sheet but that copies of their statements recorded under section 162 of the Criminal Procedure Code should have been furnished to the accused before the commencement of the inquiry. Bringing in of such evidence without making any reference to it whatsoever at the time of the filing of the charge-sheet is against the spirit of the amendment and this ought not to be allowed lightly without a suitable and proper explanation from the prosecution for adopting this unusual procedure. By this, the right that has been conferred on the accused is sought to be undermined and it ought to be discouraged. On the top of these two more witnesses who were not even examined during the investigation are sought to be examined on the side of the prosecution. As they were not examined by the police they would not have made their statements under section 162 of the Criminal Procedure Code. The complaint, therefore, that copies of the statements of these witnesses recorded under section 162 of the Criminal Procedure Code were not furnished to the accused is without force but by far the greater objection is with regard to the right of the prosecution to examine such witnesses. The prosecution attempts to spring an utter surprise on the accused by the examination of these witnesses. By this method the benefit that has been conferred on the accused as compensation for depriving him of certain other benefits which he enjoyed before the amendment of the Criminal Procedure Code is sought to be taken away with the result that the accused is neither here nor there. It is true that the prosecution and the accused must receive equal protection under the laws with the one exception that where there is a doubt in the case put forward by the prosecution, the benefit of that doubt must be given to the accused. In all other respects neither should have an advantage over the other. The right of the prosecution to examine as many witnesses as it likes or such of the witnesses as it chooses cannot be disputed. What the amendment to the Criminal Procedure Code provides is that the only side that is the accused must know before the commencement of the inquiry what witnesses the prosecution proposes to examine and what documents it proposes to file, so that the accused may know the full case against him as disclosed by the investigation. This right of the accused to know the case against him before the commencement of the inquiry cannot be defeated or undermined nor can it be watered down in any manner. The prosecution must decide before the commencement of the inquiry what witnesses it proposes to examine in support of its case, and mention their names in the charge-sheet that is filed, under section 173 and furnish or cause to be furnished to the accused copies of statements of those witnesses recorded under section 162 during the time of the investigation of the case. If this is not done, the prosecution has no right to call any witness they like subsequently and spring a surprise on the accused. This is the restriction placed on the right of the prosecution to call any witness not cited in the charge-sheet or not even examined during the investigation. But the right of the Court to examine such witnesses as it thinks necessary under section 540 of the Criminal Procedure Code is not taken away by the new amendment to the Criminal Procedure Code and this provision is kept intact. The Court, therefore, can still examine such witnesses as it thinks necessary in the circumstances mentioned in that section. The power of the Court to examine Court witnesses is limited by the circumstances mentioned therein. It is a discretionary power and this discretion has to be exercised judicially. The scope of exercising this judicial discretion is governed by certain well-established principles. *Vide* the decision of this Court in *K. V. R. S. Mani* v. *State*[1], and the various other cases referred to therein. All these decisions show that there is power in the Court to examine such witnesses as it thinks necessary for reasons to be recorded by it. In the present case for the reasons given above, the two witnesses, Narayana Rao and Chitti Babu, sought to be examined by the prosecution cannot be allowed to be examined on the side of the prosecution. As to whether they can be examined as Court witnesses or not, it is left to the discretion of the Court below. There is no doubt that the lower Court will exercise the discretion vested in it by the provisions of section 540 of the Criminal Procedure Code judicially and in accordance with the well-recognised principles laid down in the case referred to above wherein other cases bearing on the same point have been referred to.

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[1] 1951 M.W.N. (Crl.) 33.

In the result the order of the lower Court permitting the examination of the two witnesses, Narayana Rao and Chitti Babu, by the prosecution is set aside and the case is directed to be disposed of according to law and in the light of the observations made above.

K.S. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

W. K. Thiruvengada Mudaliar .. *Petitioner**

v.

Doraiswami Naidu .. *Respondent.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), section 4—Applicability and scope.

The provisions of section 4 (1) of the Madras Indebted Agriculturists (Repayment of Debts) Act which permits an agriculturists-debtor to pay his liability under a decree in certain instalments must obviously refer to decrees passed before the commencement of the Act. In cases of suits filed after the commencement of the Act and those that are pendng at the time, the provisions of section 4 (4) of the Act will apply and a debtor should claim the benefits of the Act at the time of the passing of the decree. If a defendant fails to do so, he cannot be allowed to claim the benefits under the Act at the time of execution.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Registrar, Court of Small Causes, Madras, dated 15th December, 1955 and made in M.P. No. 2747 of 1955 in E.P. No. 3916 of 1955 in suit No. 1549 of 1955.

K. Srinivasan and *K. Shunmugham* for Petitioner.

Inamdar Abdus Salam for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition arises out of an order passed by the Registrar of the Court of Small Causes in execution of a small cause decree in Suit No. 1549 of 1955. The decree was passed for the whole of the amount claimed; but the defendant was allowed to pay it in monthly instalments of Rs. 5. As there was default in the payment of the monthly instalments execution was taken out for the whole of the balance remaining unpaid. That decree was passed in March, 1955, after Madras Act I of 1955 came into force. The defendant appeared in Court and admitted the claim but did not plead under that Act that he was an agriculturist and as such entitled to the benefit of that Act. Nevertheless as stated above, the Court passed a decree against him on more favourable terms, namely, for payment in instalments of Rs. 5 a month. When on default being committed and execution taken for the balance remaining unpaid the judgment-debtor raised objections to the execution, one of which was that he was an agriculturists and therefore entitled to the benefit of the Act. That objection was upheld by the Registrar who was of the opinion that the judgment-debtor may claim the benefit of Madras Act I of 1955 for the first time at the time of the execution of the decree and the executing Court, if it finds him to be an agriculturist entitled to the benefit of the Act, could give him such relief as the Act provides for. The learned Registrar has not adverted to the provisions of the Act. The relevant section is section 4. Clause (1) of that section provides for the payment of the liability in certain instalments notwithstanding any law, custom, contract or decree of Court and the first of such payments is to be made within four months of the commencement of the Act. It is therefore obvious that the decree referred to in clause (1) must be a decree which had been passed before the commencement of the Act.

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* C.R.P. No. 424 of 1956. 3rd January, 1957.

It follows that the judgment-debtor in the present case cannot invoke the aid of clause (1) for the purpose of payment as provided by the clause. Clause (3) of that section provides for suits filed after the commencement of the Act. The present is a case of a suit pending at the commencement of the Act and decreed after the Act came into force. To such a case, clause (4) of that section will be applicable. That clause provides that where in any suit for the recovery of a debt pending at the commencement of the Act, the debtor claims to be an agriculturist the Court shall if the debtor is an agriculturist pass a decree for the immediate payment of such instalments as would have become payable under the provisions of sub-section (1) and the balance in further instalments as provided therein. This clause therefore contemplates that the debtor, before the decree is passed, should claim to be an agriculturist and to be entitled to the benefits of the Act. That the present judgment-debtor did not do. It follows that in the execution of that decree he cannot be allowed to claim the benefits under the Act which he did not claim at the time when the suit was decreed. This view finds support in the decision of a Bench of this Court reported in *Kotayya* v. *Venkata Punnayya*[1], in connection with the Madras Act IV of 1938. This revision is therefore allowed with costs.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Govinda Padayachi .. *Appellant**

v.

Kannammal .. *Respondent.*

Civil Procedure Code (V of 1908), *section* 47—*Second Appeal—Appeal against non-appealable order entertained and disposed of—Second appeal—Competency—Civil Procedure Code, Order* 21, *rule* 57 (*Madras Amendment*)—*Default—Dismissal of execution petition for—What amounts to—Decree-holder not pressing petition in view of adjournments and claim petitions—Court ordering "Not pressed. Attachment to continue"—If dismissal for default—Effect on attachment.*

Although an order passed in execution dismissing a claim petition does not fall under section 47, Civil Procedure Code and is not subject to appeal, when an appeal is preferred and entertained and disposed by the lower Court, a second appeal against the order of the lower Court is competent and has to be dealt with on the mertis and could not be dismissed as incompetent.

Anjayya v. *Gundarayudu*, (1943) 2 M.L.J. 539 : I.L.R. (1943) Mad. 702 and *Venkata Rao* v. *Surya Rao*, (1949) 1 M.L.J. 320 : I.L.R. (1950) Mad. 39, followed.

Order 21, rule 57, Civil Procedure Code, as amended in Madras, will come into play only when an execution petition is dismissed for default of the decree-holder, and it is only in such a case that the attachment will come to an end, whether there is or there is not an order of Court terminating the attachment. When an execution petition was being adjourned from time to time, and claims were preferred to the attached property and the decree-holder, after several adjournments, states to the Court that the application is not pressed, and the executing Court terminates the proceedings by an order in those terms, namely, "Not pressed. Attachment to continue", the order cannot be construed as and does not amount to an order dismissing the execution petition for default of the decree-holder, within the meaning of Order 21, rule 57, Civil Procedure Code. Such an order could only mean that the application was kept in suspense for the time being, to be renewed at a later stage, and the attachment does not cease.

Thakur Prasad v. *Fakirullah*, (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.); *Dhondha Misir* v. *Sheikh Qurban*, A.I.R. 1947 All. 313; *Mandhyan Sheikiya* v. *Badram Dalni*, (1912) 17 C.W.N. 204 and *Ramabadra Reddiar* v. *Ramachandra Reddiar*, (1952) 2 M.L.J. 73, considered.

Perianan Chettiar v. *Lakshmanan Chettiar*, (1934) 68 M.L.J. 265; *Venkata Rao* v. *Surya Rzo*, (1949) 1 M.L.J. 320 : I.L.R. (1950) Mad. 39 and *M. Rukmani* v. *Ramasarup*, I.L.R. (1944) Nag. 739 : A.I.R. 1944 Nag. 324, followed.

Appeal against the order of the District Court of South Arcot, dated 19th December, 1953 and passed in A.S. No. 371 of 1953, preferred against the order of the Court of the District Munsif of Vridhachalam in M.P. No. 668 of 1951 in O.S. No. 14 of 1937.

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[1] (1940) 2 M.L.J. 202.

* A.A.A.O. Nos. 71 of 1954 and 85 of 1954. 28th March, 1956.

M. Natesan, P. C. Parthasarathi and *K. V. Venkataseshadri* for Appellant.

M. S. Venkatarama Ayyar for Respondent.

The Court delivered the following

JUDGMENT.—These two Second Appeals arise out of the common judgment of the learned District Judge of South Arcot dismissing two appeals preferred against the orders of the learned District Munsif of Vridhachalam, dismissing in turn the two claim applications M.P. Nos. 655 of 1951 and 668 of 1951.

The decree-holders respondents in these two appeals had obtained a decree in O.S. No. 14 of 1937 on the file of the District Munsif's Court of Vridhachalam, South Arcot, for specific amounts by way of maintenance in their favour. These amounts were also made a charge over the properties set out in the schedule to the decree. The decree also was against the assets of the first defendant in the hands of the other defendants. Subsequent to the decree the charged properties appear to have been sold away by the heirs of the first defendant. The decree-holder applied for execution of the decree in E.P. No. 215 of 1950 and prayed for attachment of certain properties not charged, and they were accordingly attached.

Two of these properties had already been sold by Thangammal, a daughter-in-law of the first defendant, acting on behalf of her minor children, in favour of Govinda Padayachi. This sale was under Exhibit A-1, dated 19th September, 1944. Another Thangammal was the purchaser of another property under the sale deed Exhibit A-4, dated 24th December, 1945. After the attachment of these properties, the vendees, Govinda Padayachi and Thangammal, filed the two applications M.P. Nos. 655 of 1951 and 668 of 1951, to get these properties released from attachment. The applications were made under Order 21, rule 58, Civil Procedure Code.

By a common order, dated 14th September, 1953, the learned District Munsif of Vridhachalam dismissed these claim petitions, upholding that the attachment made on 19th April, 1944, was valid and that the rights of the claimants could not prevail as against the decree-holders' rights. Against that order the two claimants preferred the two appeals A.S. Nos. 371 and 382 of 1953. The learned District Judge, concurring with the order of the learned District Munsif, dismissed the two appeals in a common order dated 19th December, 1953. The two claimants Govinda Padayachi and Thangammal have preferred these two miscellaneous second appeals referred to above.

It must be stated towards the decree obtained by the respondents, the judgment-debtors had paid some amounts in instalments. The decree itself was for payment of Rs. 10 per mensem by way of maintenance for the wife and Rs. 5 for children. When the claim petitions were being investigated in E.P. No. 215 of 1950 by the learned District Munsif, the records disclosed that the sale deeds in favour of the respondents vendees had come into existence after attachment had been effected on a prior execution petition, *viz.*, E. P. No. 279 of 1944. That attachment was on the 14th September, 1944; that is, some days prior to the sale deeds in favour of the respondents. The execution application in which the prior attachment had taken place, *viz.*, E.P. No. 279 of 1944, was being adjourned from time to time and some claim petitions appear to have also been filed in that petition; which, however, did not succeed. Ultimately the execution petition itself was adjourned for sale papers more than once. On the 14th April, 1945, the execution Court terminated the proceedings by an order in these terms "Not pressed. Attachment to continue". The learned District Munsif, who construed these proceedings after he had reserved orders in the claim petitions now in question, came to the opinion that the sale deeds in favour of the respondents having come into existence after the properties had been attached and during the continuance of the attachment, could not prevail against the decree-holders. It is this conclusion of the learned District Munsif that has been attacked before the learned District Judge and is also now pressed for in these two appeals.

A preliminary point was taken that the appeals before the learned District Judge were not competent on the ground that section 47 of the Civil Procedure Code did not apply to petitions filed before the learned District Munsif. It was argued that the claimants in the two petitions could not be deemed to be legal representatives of the judgment-debtors. In view of the decisions of this Court in *Anjayya* v. *Gundarayudu*[1], and *Venkata Rao* v. *Surya Rao*[2], I do not think that there is any need for me to discuss this point at any length. I am of the opinion that the ruling in these decisions would apply to the facts of this case and the appeals having been entertained and disposed of by the learned District Judge, the second appeals in this Court are competent and they have to be dealt with here on their merits.

Mr. Natesan in the main contended that the order passed on the 14th April, 1945, to the effect that the E.P. was " not pressed " and that the " attachment was to continue " was in fact an order dismissing the E.P. outright and that the expression " attachment to continue " was irrelevant and could not amount to a subsistence of the attachment of the properties already made. A good deal of time was taken in the discussion of the meaning and import of the language of the original rule 57, Order 21, Civil Procedure Code, and also the Madras amendment made thereto. Numerous decisions were also cited by counsel on both sides in support of their respective contentions based on the interpretation of the amended rule 57 of Order 21, Civil Procedure Code. But, as has been repeatedly laid down by the decisions of this Court and also of other High Courts in this country, what was intended and what was expressed by the learned District Munsif, when he passed the order on the 14th April, 1945, has to be determined in the light of the circumstances and on the facts of the case, and there can be no uniform rule applied in every case, irrespective of what the circumstances and the facts may be. Both sides have conceded that the determination as to what was intended by the learned District Munsif when he passed the order in question has to be done only with reference to the circumstances when the order was passed.

We have then to consider the actual circumstances in which the learned District Munsif passed the order in terms, *viz.*, " Not pressed. Attachment to continue " on the 14th April, 1945. It must be remembered that the decree itself was only a maintenance decree under which the maintenance amount was to be paid in instalments from month to month. The possibility, therefore, of these instalments being paid regularly, default being committed thereof, and such default being made good at a later stage, cannot be ignored. As a matter of fact in this case there seems to have been default committed, lump sums having been paid to make good the defaulted instalments. Whenever default is committed under an instalment decree, it is the right of the decree-holders to seek the aid of the Court to enforce payments under the decree and the execution of the decree can be avoided by the judgment-debtors by making payments or by asking extension of time for payments of the defaulted instalments. The application in question seems to have been one such application for execution of the decree to enforce payment of the defaulted amounts. When such an execution is taken out, there is also the possibility of the decree-holders coming to an understanding with the judgment-debtors in regard to the manner and the method of paying the defaulted instalments. Any such understanding would necessarily have effect upon the further prosecution of the execution petition. It is in this background that the last order in question has to be considered and understood. The earlier order was one directing the decree-holders to file the sale papers. Thereafter the decree-holders approach the Court and represent that they do not propose to press the application, but at the same time make a request that the attachment should be continued. In these circumstances the Court on invitation by the decree-holders passes the orders " Not pressed. Attachment to continue ". The question then is whether either the decree-holders or the Court intended to put an end to the execution petition once for all, or whether it was intended by the applicants, as also by the Court, that the execution before the Court was to be kept in suspense and renewed later on, whenever the need arose for the same and that in the meanwhile the attachment that had already been effected should not be raised but should be allowed to continue until such time as the decree-holders were compelled to approach the Court to render them further aid in the matter of the realisation of the debt due under their decree. It is contended by Mr. M. S. Venkatarama Ayyar, the learned counsel for the decree-holders that if the result which was intended to follow from the terms of the order passed by the Court was that the attachment should be continued, the meaning to be attached to the expression "not pressed" could not amount to a dismissal of the execution application for default but could be understood to mean only that the application was kept in suspense for the time being to be renewed at a later stage. On the other hand, Mr. Natesan would argue that rule 57 of Order 21, as amended by the Madras High Court, does not leave any scope or room for an order of the kind passed by the learned District Munsif in the present case. It is his contention that according to the first part of rule 57, the Court has only two alternatives when any property was attached in execution of a decree. The first is to dismiss the application, and the second is to adjourn the proceedings to a future date; and when it resorts to either of these alternatives, the Court has to make it clear whether the attachment continues or ceases. In this case, the Court did not adjourn the proceedings to a future date. According to him the effect of the order, therefore, is only a dismissal though the very term was not used, and when a dismissal has taken place, there cannot be a continuation of the attachment and any order that the attachment should continue could not be of any avail and it would also be meaningless in the context. The Provisio to rule 57 of Order 21 is next relied upon by the learned counsel for the appellant, which says that when the Court dismisses the execution application by reason of the decree-holder's default, the order shall state that the attachment do cease. His contention is that when the decree-holders reported to the Court that they were not pressing the execution application, it meant that they were not willing to prosecute the application further and such failure to prosecute the application tantamounts to a default on the part of the decree-holders and that when such a default occurs by reason of the failure of the decree-holders to further proceed with the prosecution of the execution application, the inevitable order should be that the attachment should cease, though it may not be expressed in such terms. If the Court had passed an order that the attachment should continue, notwithstanding the fact that the decree-holders had committed default by their failure to proceed with the execution application, the order that the attachment should continue is not warranted and is meaningless and could not be given effect to and the Court is not authorised by the Proviso to rule 57 of Order 21 to pass an order continuing the attachment when default on the part of the decree-holders had arisen and which default left the Court with the only alternative, *viz.*, to dismiss the application. This argument seems to be plausible, but I do not think that in the circumstances of the present case it can be accepted.

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[1] (1943) 2 M.L.J. 539 : I.L.R. (1943) Mad. 702.

[2] (1949) 1 M.L.J. 320 : I.L.R. (1950) Mad. 39.

The Proviso, in the first instance, states that the Court should dismiss the application. In the second instance, it provides that such dismisssal should be by reason of the decree-holders' default; and in the third instance it lays down that when these two things happen, the Court shall state that the attachment do cease. It is obvious that when the executing Court made an order in the present case, it did not "dismiss" the application. It merely stated, "Nor pressed." "Not pressed" need not necessarily mean a dismissal in all cases. It may mean that it is an order for statistical purposes which necessarily need not be a final termination of the execution application. It may also mean that the execution application is for the time being not pressed but kept in suspense for being renewed at a later date. When the order does not state that the application is dismissed, it is diflcult to say that the Court intended to arrive at that result by the actual use of the words "not pressed."

In the second place, there should be a default on the part of the decree-holder in order to enable the Court to dismiss the application and to direct that the attachment should cease. In this case there has been only a report to the Court that the application is not pressed. Such a report need not necessarily mean, nor involve a default on the part of the decree-holder. If the Court understood the representation of the decree-holders that they were not pressing the application to be a default on their part or a failure to prosecute the execution application, the Court would certainly have not stopped with the expression "not pressed" alone, but would have indeed gone further and stated that the application not being pressed was dismissed. On the other hand, what the Court has actually done is that instead of following up the expression "Not pressed" by the expression "Dismissed," it records the expression "Attachment to continue" instead of stating that "Attachment shall cease." This would naturally lead to the inference that the Court was not willing to dismiss the application but on the other hand was willing to allow the attachment to continue, notwithstanding the fact that the decree-holder was reporting that he was not willing to proceed with the application further at that time. The Court did not, therefore, understand the representation "Not pressed" to mean that there was a failure or a default on the part of the decree-holders to merit an order of dismissal or a discontinuation of the attachment already effected. If the Court had intended that the execution petition should be treated as dismised for default, and that the proceedings should terminate finally, it would have felt bound to order that the attachment was also to cease. But the Court exercised its discretion actually the other way. It did not dismiss the application ; nor did it also order the ceasing of the attachment. When such an order has been made in the exercise of a discretion vested in the Court, it cannot be said that the Court intended a final termination of the execution application. The Court cannot be said to have also found that there was default on the part of the decree-holders when it did not choose to make an order that petition stood dismissed. I am therefore unable to hold in this case that there has been a dismissal for default. Nor am I prepared to hold that non-prosecution of the execution application conveyed by the term "Not pressed" would necessarily mean a default of the kind contemplated under rule 57. Non-prosecution may be due to various causes, which may not be expressed by the party reporting to the Court that the application is not pressed. In my opinion, while the old rule 57 of Order 21 provided for only two alternatives and it gave rise to difficult situations, the Madras amendment was intended to make the position more elastic and vest a greater discretion in the Court when disposing of execution applications. I am inclined to agree with the ruling in *Perianan Chettiar* v. *Lakshmanan Chettiar*[1], wherein a Bench of this Court has held that an execution petition which is, 'closed' does not stand dismissed so as to attract the mischief of Order 21 rule 57, Civil Procedure Code. The distinction between 'closed' and 'dismissed' has been pointed out in the said decision ; and the argument that failure to pay batta amounted to a default and the closing of the application should be construed as the dismissal was repelled. In *M. Rukmani* v. *Ramasaroop*[2], it was held by Bose, J., that

> "when the court expressly keeps the attachment alive it cannot be said to have ceased unless the provisions of Order 21, rule 57, apply, that is to say, when there has been a default of the decree-holder which compels the Court to dismiss the application. It is, however, impossible to say that there is any default on the part of the decree-holders when they accede to their judgment-debtors' request for time or for instalments."

This decision, in my opinion, would apply to the facts of the present case. In *Venkata Rao* v. *Surya Rao*[3], it was held that the dismissal of an execution petition for default of a decree-holder terminates the attachment whether there was or was not an order of the Court stating the consequence. As already pointed out, in this case, it cannot be said that there was a dismissal for a default on the part of the decree-holders. With respect I am in entire agreement with the reasoning that is found in this decision, which fully applies to the facts of the present case. I must observe in this connection that the several decisions, which Mr. Natesan, the learned counsel for the appellant, has placed before me beginning from *Thakur Prasad* v. *Fakirullah*[4],

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1. (1934) 68 M.L.J. 265.
2. I.L.R. (1944) Nag. 739 : A.I.R. 1944 Nag. 324.
3. (1949) 1 M.L.J. 320 : I.L.R. (1950) Mad. 30.
4. (1894) 5 M.L.J. 3 : L.R. 22 I.A. 44 : I.L.R. 17 All. 106 (P.C.).

of the year 1895 and *Mandhyan Sheikiya* v. *Badram Dalni*[1], of the year 1912 and ending with *Dhondha Misir* v. *Sheikh Qurban*[2], and *Ramabadra Reddiar* v. *Ramachandra Reddiar*[3], do not seem to be of much assistance to the learned counsel to support his contention that the expression used in the present case should be interpreted to mean that it was a dismissal for default and that the attachment should be automatically deemed to have ceased, though there was an order to the contrary effect. Consequently he claimed that the sales made in favour of his client should be upheld. No general rule can be inferred from these decisions. I am, on the other hand, of the view that in this case, as has been correctly held by the Court below, section 64, Civil Procedure Code, does apply to the facts; and these two appeals have, therefore, to be dismissed and are accordingly dismissed with costs, one set only. No leave.

P.R.N. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

The State of Madras represented by the Collector of Tirunelveli .. *Petitioner**

v.

His Holiness Srila Sri Subramania Pandara Sannidhi Avergal, Adhinakarthar, Thiruvaduthurai Adhinam, Thiruvaduthurai .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 1, *rule* 10 (2)—*Powers of Court—Addition of defendants—Proceedings under Madras Estates (Abolition and Conversion into Ryotwari) Act,* 1948—*Finding of suit lands to be inam estate after notice to landlord and ryots—Finding confirmed by Estate Abolition Tribunal in appeal and by High Court in Writ Application—Plaintiff directed to bring suit—Suit for declaration of inapplicability of Act to suit lands and of invalidity of proceedings thereunder—Non-joinder of ryots—Power of Court to order addition of ryots as defendants'—Section* 151.

In proceedings under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, the settlement officer constituted under the Act gave a finding to the effect that the suit lands owned by the plaintiff constituted an inam estate after giving notice to the plaintiff and the ryots concerned and after hearing them. The plaintiff's appeal to the Estates Abolition Tribunal failed. He then applied to the High Court for a writ to quash the finding of the Tribunal and again failed, but was directed by the High Court to establish his rights by a properly constituted suit. The plaintiff thereupon brought a suit for a declaration that the provisions of Madras Act XXVI of 1948 would not apply to the suit lands that the notification issued and proceedings taken under the Act are null and void, basing his cause of action on the findings of the Tribunal and on the notification following thereon as well as the order of the High Court on the Writ Application. The plaintiff impleaded only the State Government, as a defendant, but did not implead the ryots at all on the ground that there was no ryoti land in the suit property and that it was his private land.

The State Government applied for impleading them as defendants to the suit, but the plaintiff opposed. The trial Court dismissed the application. The State Government having applied to the High Court in revision against the order of the lower Court.

Held : that having regard to the prior proceedings and the real purpose and object of the suit, namely, to obtain an adjudication that the suit lands are not, lands in respect of which any ryots could claim occupancy rights, as the lands were his private lands and that the plaintiff was seeking to set aside the findings arrived at and upheld at three stages, in the presence of himself and the ryots on the property after notice to them, whatever be the bare form of the plaint, the suit was eventually one in which there should be a final adjudication of the rights not only of the plaintiff but also of the ryots who have already figured in the proceedings and the ryots should be brought before the Court and given an opportunity to urge their case so as to enable the Court to give a final adjudication of the real points involved in the suit, both in order to avoid multiplicity of proceedings and in the ends of justice and in the interests of all parties concerned.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge (Principal) of Tirunelveli, dated 5th February, 1955 and made in O.S. No. 45 of 1954.

The Government Pleader (*C. A. Vaidialingam*) for Petitioner.

M. Ranganatha Sastri, *S. Gopalan* and *M. V. Kapali Sastri* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the decision of the learned Subordinate Judge dismissing the application of the petitioner to implead the ryots said to be on the suit village as party defendants to the suit brought by the respondent.

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[1] (1912) 17 Cal. W.N. 204.

[2] A.I.R. 1947 All. 313.

[3] (1952) 2 M.L.J. 73.

*C.R.P. No. 639 of 1955. 6th January, 1956.

After the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, was passed, the Settlement Officer constituted under the Act gave notices to all the interested parties to determine the question as to whether the properties were an estate or not. After hearing the ryots as well as the landlords, the Settlement Officer gave his findings. Against those findings, the plaintiff landlord preferred an appeal to the Estates Abolition Tribunal constituted under the Act. That Tribunal upheld the finding of the Settlement Officer that it was an inam estate. Thereupon the plaintiff filed a Writ Application to quash the findings of the Tribunal. There also the plaintiff lost, but he was directed to establish his rights by a properly framed suit. The plaintiff therefore brought the present suit.

In framing the suit, the plaintiff made only the State Government as party defendant and did not make the ryots on the land, defendants. His reason for doing so is that he does not admit that there is any ryoti land involved in the suit properties but contends that the entire land is his private land. When faced with, the question as to why the plaintiff made ryots parties in his appeal before the Tribunal as also in the Writ Application, his answer is that because they were parties to the finding of the Settlement Officer, he had necessarily to make them also parties and they were merely *pro forma* parties.

It has also to be mentioned in this connection that after the suit was filed by the plaintiff, two of the ryots of the village came to the Sub-Court with an application that they should be impleaded as party defendants and their application was dismissed. These ryots who lost the petition did not pursue the matter further to assert their right to be impleaded as parties. The plaintiff-respondent before me relies strongly upon this circumstance to disentitle the Government's application to make the other ryots in the village parties to the suit.

It is the contention on behalf of the petitioner before me, represented by the Government Pleader, that the substance of the plaint as also the substance of the relief claimed by the plaintiff in his suit should be taken into consideration and not the mere form which has been deliberately adopted by the plaintiff in order to have an easy way of the matter. The plaint no doubt seeks a relief only for a declaration that the provisions of Madras Act XXVI of 1948 are not applicable to suit lands and that the notification issued and proceedings initiated under the said Act are null and void. But in the paragraph relating to the cause of action the plaint avers that the cause of action for the suit arose on 30th July, 1951, the date on which the Estates Abolition Tribunal gave their finding, on 2nd July, 1952, the date on which the defendant notified the hamlets, on 21st January, 1954, the date on which the High Court was pleased to direct the plaintiff to file a suit.

It is fairly clear, having regard to the previous proceedings that the real purpose and object underlying the present suit of the plaintiff is to get an adjudication that the suit lands are not lands in respect of which any ryots could claim occupancy rights and that they are his private lands in which the plaintiff alone is entitled in his own right. Further, the fact remains that the plaintiff is seeking to set aside a finding that has been arrived at and which has been upheld at three stages, in the presence of not merely the plaintiff himself but also in the presence of as many as 8 ryots to whom notice was issued, that the suit land formed part of an inam estate and not the private land of the plaintiff. It is that finding which is now sought to be set aside by the present suit brought by the plaintiff. That finding, it cannot be denied, has been arrived at after due notice and in the presence of other parties as well. This finding is also the result of the process of law having been set in motion in order to adjudicate as to whether the plaintiff alone would be the person entitled to any rights in the property or there are any other people who are also entitled to occupancy rights and in whose favour the legislation intended to confer ryotwari pattas.

When it is, as I hold, the object of the suit to set aside in effect the findings of three tribunals that it is an estate and not the private holdings of the plaintiff, it cannot be denied there are other parties whose rights are involved and who could also come up at any time in order to vindicate their rights in respect of the suit lands.

Such being the case, whatever might to the bare form of the plaint now before Court, looking at the substance and the object underlying the plaint, it seems to me eminently a case where there should be final adjudication of the rights not merely of the plaintiff but also the ryots who have already figured in the previous proceedings. For this purpose, unless the ryots in the village are also before the Court, there cannot be a final adjudication as to what exactly is the character of the suit lands and if the plaintiff alone gets an adjudication in his favour, it does not prevent the other parties coming up before the Court to claim a contrary relief and the result would be multiplicity of the proceedings and suits. It is therefore quite obvious that in order that there should be a final adjudication of the real points involved in the suit, all parties should be brought before the Court and they should be given an opportunity to urge their case. The attempt of the petitioner therefore to implead the ryots seems to be justified in the circumstances of the case considering the real object underlying the suit. Besides in the ends of justice and in the interests of all parties concerned, it seems to me also desirable that there should be an adjudication once for all and for that adjudication all the parties that may be affected or interested in the suit land should be before the Court. In that view, I think the learned Subordinate Judge ought to have allowed the application of the State Government for making the ryots of the village parties to the suit.

Some difficulty was sought to be made out of the vagueness or indefiniteness of the ryots of the village. I do not think there is any real difficulty in this matter because the Civil Procedure Code gives ample scope for making the ryots come on record in a representative capacity. The plaintiff is therefore directed to bring on record the ryots of the village under Order 1, rule 8, Civil Procedure Code, by making the necessary application to the Court below and obtaining orders in that direction.

In regard to costs that might become payable to the defendants now added at the instance of the State Government, I do not think there is any justice in making the plaintiff pay them any costs if any awarded. The finding of the lower Court on issue (4) is set aside and the suit will proceed after the formalities being complied with.

The petition is allowed. No costs.

P.R.N. *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

A. K. Subramania Chettiar .. *Appellant**

v.

A. Ponnuswami Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), section 51 (c) and Proviso, Order 21, rules 21 and 30—Scope.

According to the procedure prescribed under Order 21, rule 40, if the Court is satisfied on the evidence that the case falls within any of the clauses in the Proviso to section 51, Civil Procedure Code, then the Court has to record its reasons in writing that the judgment-debtor should be committed to prison for one of the reasons set out therein. If the cause is insufficient the Court is then bound to order arrest. If on the other hand the decree-holder fails to prove that the circumstances specified in the section exist the Court is bound to reject his application.

Simultaneous execution both against the property and person of the judgment-debtor is allowed under Order 21, rule 30, but is subject to the discretion of the Court under Order 21, rule 21.

Appeal against the order of the Court of the Subordinate Judge of Coimbatore, dated 20th January, 1955, and made in E.P.R. No. 255 of 1954, in O.S. No. 162 of 1949.

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*A.A.O. No. 35 of 1955. 13th November, 1956.

M. S. Venkatarama Ayyar for Appellant.

M. R. Narayanaswami for Respondent.

The Court delivered the following

JUDGMENT:—This appeal is preferred against the order of the learned Subordinate Judge of Coimbatore in E.P.R. No. 255 of 1954 in O.P. No. 162 of 1949.

This Case brings forcibly to mind the dictum of their Lordships of the Privy Council in *Court of Wards* v. *Maharajah Coomar Ramapat*[1], that the woes of an Indian litigant begin only after he has obtained a decree.

The appellant before us, judgment-debtor, Subramania Chettiar is the owner of 300 acres of land of which 30 to 40 acres are nanja lands and the annual rent is about Rs. 10,000 to Rs. 15,000 even according to himself. He admits that he also owns and goes about in a motor car. The decree-holder states that this judgment-debtor has got properties worth six to seven lakhs and gets an annual income of Rs. 40,000 and also owns a motor car. R.W. 2 admittedly a relation of the judgment-debtor has admitted that the judgment-debtor owns lands worth six to seven lakhs of rupees and that he has got also a house. It may be that the judgment-debtor is unduly depreciating his worth and the decree-holder is unduly exaggerating his worth. But there is sufficient evidence, however, to show that this judgment-debtor is a very well-to-do man indeed.

In these circumstances the respondent before us who has obtained a decree in O.S. No. 162 of 1949 against this appellant is seeking to execute it and has not been able to get his decree satisfied owing to the familiar tactics employed by the judgment-debtors to defeat and delay the decree-holders from realising the fruits of their decrees. The following tabular statement will establish this :

28th July, 1951 ..	Preliminary decree in O.S. No. 162 of 1949 was obtained in the Sub-Court, Coimbatore. Final decree for Rs. 32,984-4-8 was obtained.
30th January, 1953 ..	E.P. No. 34 of 1953 filed by the decree-holder for attachment and sale of his properties. (Then the judgment-debtor filed A.S. No. 53 of 1953 in the High Court against that decree and applied for stay of execution in C.M.P. No. 5565 of 1953).
21st July, 1953 ..	In C.M.P. No. 5563 of 1953 the judgment-debtor was directed to deposit half the decree amount and furnish security for the other half within eight weeks. The judgment-debtor did not carry out the directions though time was extended twice by the High Court.
E.A. No. 1261 of 1953 in E.P. No. 34 of 1953.	Filed by the judgment-debtor in the Sub-Court, Coimbatore for stay of all execution proceedings under Madras Ordinance V of 1954. It was dismissed by the Sub-Court. The judgment-debtor filed an appeal against that order in C.M.A. No. 322 of 1954 and applied in C.M.P. No. 6297 of 1954 for stay.
18th August, 1954	C.M.A. No. 322 of 1954 was dismissed.
20th December, 1954.	Suit by the sons of the judgment-debtor and separate possession of their shares.
E.A. No. 391 of 1954 ..	Petition by the sons of the judgment-debtor for stay of execution of the decree so far as their interests were concerned. This was dismissed.
1st November, 1954 ..	E.P.R. No. 255 of 1954 was filed for arrest of the judgment-debtor.
20th January, 1955 ..	Arrest ordered in the said execution petition. The present appeal is filed against the order.

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[1] (1872) 14 M.I.A. 605 at p. 612.

The learned Subordinate Judge when he was asked to order arrest of this judgment-debtor and which is the subject-matter of the present order in E.P.R. No. 255 of 1954 now under appeal, he had to consider two points, *viz.*, whether the decree-holder had established that the judgment-debtor had sufficient means to pay the decree amount within the meaning of clause (*b*) to the Proviso to section 51 of the Code of Civil Procedure and secondly, whether simultaneous execution can be allowed. On both these points the learned Subordinate Judge held against the judgment-debtor and ordered arrest. Hence this appeal.

That the judgment-debtor has sufficient means to pay the decree debt can admit of no doubt whatsoever. His properties apparently seem to be worth six to seven lakhs of rupees consisting of 300 acres of land of which 30 to 40 acres are nanja, buildings, etc. Even if the judgment-debtor's net income is not Rs. 40,000 as mentioned by the decree-holder and much more than Rs. 10,000 or Rs. 15,000 as mentioned by the judgment-debtor, it would certainly be in the region of Rs. 20,000 at least. The judgment-debtor wants to get over this possession of ample properties for meeting this decree-debt in two ways. First of all he says that he is not realizing any income from the properties regularly. The learned Subordinate Judge who has analysed the evidence of the witnesses examined by him has come to the conclusion in paragraph 7 of his order with which I agree that making every allowance the share of the respondent judgment-debtor in the properties will certainly be very much more than the decree amount and that he has means to pay the decree debt. Secondly, the judgment-debtor contended that his properties are under attachment and that therefore he cannot dispose of them and pay this decree debt. But as pointed out by the learned Subordinate Judge the judgment-debtor owns about 300 acres of land of which 30 to 40 acres are nanja and that as regards the properties attached it is seen that in E.P. No. 34 of 1953, 74 cents of wet land were attached in addition to some other lands and that even if the properties are attached the judgment-debtor can always ask for and would be given permission by the Court to sell properties by releasing a portion and ear-marking the sale price for the discharge of the decree debt. The judgment-debtor attempted to meet this by stating that there will be no purchasers for the properties which is an absolute falsehood, because the decree-holder undertook to bring purchasers if the judgment-debtor was willing to sell the properties and in fact he would even be prepared to purchase them himself in satisfaction of his decree debt. Therefore the conclusion of the learned Subordinate Judge that the decree-holder has affirmatively and satisfactorily shown that the judgment-debtor has the ready as opposed to remote means to pay the decree debt and that he is deliberately evading to do so has been fully established and point 1 taken by the judgment-debtor fails. *Karim* v. *Habeba*[1], *Jogesh Chandra* v. *Datta*[2], *Ponnuswami* v. *Narayanaswami*[3], *Gubbay* v. *Ramdoyal*[4].

In considering whether the decree-holder has affirmatively shown that the judgment-debtor has sufficient means to pay the decree amount and which burden can be discharged either by affirmative evidence or by placing sufficient circumstances before the Court to lead to that inference, the Court should bear in mind what has been laid down in *Madhavan Nambiar* v. *Chaldean Syrian Bank, Ltd*[5], *viz.*, that the Code was amended so as to protect honest debtors of all classes from detention in prison and to confine such provisions to debtors proved to be recalcitrant or fraudulent or contumacious *Morris* v. *Ingram*[6], per *Jessel, M. R.*, that it applies to all judgment-debtors and the protection is restricted only to small debtors, that it is open to a Court to apply a judicial corrective to the extreme lengths to which the onus which the Code casts on decree-holders is sought to be taken by adopting the view that it is perfectly open to an executing Court on the materials placed before it, to come to

as a rider to or extension of this main provision in relation to a defined anterior period. Section 8 is really a part of section 7 defining the quantum of the statutory fair rent.

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[1] A.I.R. 1951 Pat. 355.

[2] A.I.R. 1942 Pat. 242.

[3] (1913) 21 I.C. 293.

[4] (1898) 2 C.W.N. 588.

[5] (1955) 2 M.L.J. 121.

[6] (1879) L.R. 13 Ch.D. 338 at 343.

an inference as regards the statutory findings required by Proviso (*a*) (2) and (*b*) of section 51 of the Code of Civil Procedure.

That simultaneous execution both against the Property and person of the judgment-debtors is allowed under Order 21, rule 30, Civil Procedure Code, is now settled law. *Muhamad* v. *Co-operative Society Sholapur*[1]; *Umakantha Banerji* v. *Renwick*[2].

But the Court has a discretion under Order 21, rule 21, Civil Procedure Code, to refuse simultaneous execution and to allow the decree-holder to avail himself of only one mode of execution at a time. In the circumstances of this case Order 21, rule 21 has no relevance. The Privy Council dictum referred to, *viz.*, the difficulties of a litigant in India begin when he has obtained a decree, is the basis for many decisions that a Court is not justified in refusing execution against the person of the judgment-debtor on the ground that the decree-holder should proceed against his property. It is its duty to offer the decree-holder all possible and reasonable facilities for realising the decretal amount in as short a time as possible, *Rameshwar* v. *Bindeshwari*[3].

Where, therefore, a decree-holder presses for arrest of the judgment-debtor, the Court cannot, except as provided by the Proviso to section 51, Civil Procedure Code, compel the decree-holder to proceed against his property or to accept payment by instalments. *Hargobind* v. *Hakim*[4]; *Baburao* v. *Mt. Gopikabai*[5]; *Dwarka Nath* v. *Sailaja Kanta*[6].

To sum up the duty of the Court is to follow the procedure prescribed under Order 21, rule 40, Civil Procedure Code and then find if it is satisfied on the evidence that the instant case before it falls within any of the clauses in the Provisos (*a*) to (*c*). If the case falls within any of the clauses of the Proviso then the Court has to record its reasons in writing that the judgment debtor should be committed to prison for one of the five reasons set out therein. If the cause is insufficient the Court is bound to order arrest. If on the other hand the decree-holder fails in the discharge of his burden to prove that the circumstances specified in the section exist, the Court is equally bound to reject the application.

Bearing these principles in mind if we examine the facts of this case, we find that the decree-holder is entitled to simultaneous execution. Point 2 fails.

There are no merits in this appeal and it is dismissed with costs. The order of the learned Subordinate Judge ordering arrest is confirmed. The stay granted by this Court will stand dissolved and further execution will proceed without further delay.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

V. Dharmalinga Moopanar .. *Petitioner**

v.

Anusamba Bi-Trust, represented by Kokilambal and others .. *Respondents.*

Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952)—*Tenants let into possession after the Act came into force—Applicability.*

The provisions of the Tanjore Tenants and Pannaiyal Protection Act are also applicable to tenants who were let into possession after the Act came into force, *i.e.*, after 23rd August, 1952.

The proper way of reading the enactment is to regard section 7 as the pivotal provision in relation to cultivating tenants notwithstanding that it factually occurs after section 6 and to read section 6

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1. A.I.R. 1943 Lah. 166.
2. A.I.R. 1953 Cal. 717.
3. A.I.R. 1936 Pat. 76.
4. (1925) I.L.R. 6 Lah. 548.
5. I.L.R. (1942) Nag. 159 : A.I.R. 1942 Nag. 58.
6. A.I.R. 1918 Cal. 186.

*W.P. Nos. 487 and 632 of 1955. 21st September, 1956.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari*, calling for the records, relating to the order of the Revenue Court, Tanjore, dated 2nd June, 1955 and 19th August, 1955, respectively and made in A.P. Nos. 55 and 95 of 1955, respectively and to quash the said orders therein (M.P. No. 31 of 1955 and M.P. No. 16 of 1955 respectively on the file of the Conciliation Officer, Tanjore).

V. Venkataraman, advocate for Petitioner in W.P. No. 487 of 1955 and for 2nd Respondent in W.P. No. 632 of 1955.

K. Raman, advocate for Petitioner in W.P. No. 632 of 1955 and 2nd Respondent in W.P. No. 487 of 1955.

The Special Government Pleader (*V. V. Raghavan*) on behalf of the 3rd Respondent in W.P. No. 632 of 1955.

The Court made the following

ORDER.—These petitions raise for consideration a very interesting and important question as to the scope of the Tanjore Tenants and Pannaiyal Protection Act, 1952.

I shall first refer to the facts in W.P. No. 487 of 1955. The tenant who is the petitioner here was allowed into possession for the cultivation season of *fasli* 1363 under a lease deed, dated 14th June, 1953, whose duration was one year. On the expiry of this term, the petitioner was threatened with eviction by the landowner. He, thereupon applied under section 13 (1) of the Act to the Conciliation Officer for determining the dispute between himself and the landowner. An objection was raised by the landowner that the tenant having been let into possession after 23rd August, 1952, when the Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952) came into force the Act was not applicable to determine his rights and the petition under section 13 was not competent and that the Conciliation Officer had no jurisdiction to adjudicate upon the dispute. The contention was that Madras Act (XIV of 1952) conferred certain statutory rights only upon two classes of cultivating tenants—(1) those who had been in possession on the first of December, 1951, but had lost possession before 23rd August, 1952 and who were entitled to be restored to possession and to the benefit of the statutory terms of tenancy under section 6 of the Act and (2) those who were in possession on 23rd August, 1952. On this basis it was urged that the rights of persons who were inducted as tenants for the purpose of cultivation after 23rd August, 1952, would be governed by their respective contracts in the light of the provisions of the Transfer of Property Act and that they would not be entitled to the advantages or the benefit of the machinery provided by the Madras Act (XIV of 1952). This interpretation of the provisions was accepted by the Conciliation Officer and on appeal by the Revenue Court and it is the correctness of this view that is challenged in this petition under Article 226 of the Constitution. As the Tribunals below have declined jurisdiction on their interpretation of the relevant statutory provisions it is clear that if the construction were erroneous the petitioner would be entitled to have those orders quashed, and an enquiry directed.

I shall now consider the scope of the Legislative provisions with reference to the terms of the relevant sections. Before doing so, I shall have to put out of account a circumstance which has been mentioned by the Conciliation Officer and which formed part of his reasoning, based upon the historical background which led to the passing of the Madras Act (XIV of 1952). This background was derived from the Preamble to the Act. The Preamble recites that in the district of Tanjore relations between landowners and their agents on the one hand and tenants and farm labourers on the other had become strained resulting in the displacement of tenants and that this rendered it necessary for the Legislature to intervene. From this statement the inference drawn by the Tribunals below was that the Act was designed to protect only those who had previously thereto suffered at the hands of the landowners or those who being then in possession were likely to suffer from such action and that the tenants who came in later were outside the purview of the legislation. I consider this reasoning unsafe and not capable of leading to any definite result for the primary purpose of the legislation was to put fetters upon the contractual rights of the landholder, which according to the framers of the enactment, were being misused.

There was no reason why such action should not be restrained or those fetters imposed for the protection of an identical class of persons emerging at a later date. It was not as if the Legislature singled out a particular category of individuals and conferred rights on them intending to deny to others, similar rights, notwithstanding that their economic situation and their position *vis-a-vis* the landlord were exactly the same and they occupied an identical position in the country's economy. It is for this reason that I am putting aside as really irrelevant the light sought to be derived from the words of the Preamble and this is precisely why I consider that it is necessary to advert primarily to the language of the operative provisions for determining the scope of the enactment.

Another line of reasoning of the Conciliation Officer and the Revenue Court for arriving at their conclusion was based on a construction of section 6. They held that section 6 and the Act as a whole contemplated and provided benefits only to two classes of tenants—(1) those who were in possession on 1st December, 1951 but not in possession on 23rd August, 1952 and (2) those in possession of their holding on 23rd August, 1952.

A close examination of section 6 however would show that it provides for three sets of cultivating tenants :—(*a*) those who were in possession on 1st December, 1951 and who continued to remain in possession on the date of the Act—these having subject to the provisions of the Act, a right to continue till 1957-58; (*b*) those who were in possession on 1st December, 1951 but not in possession on 23rd August, 1952. This class had a right to be restored to possession of the land evicting even a cultivating tenant let in meanwhile and (*c*) those who were in possession during the agricultural year 1950-1951 but not in possession on 1st December, 1951. having a qualified right to be restored to possession, the qualification being that no cultivating tenant was let into possession of the holding before 1st December, 1951. These are the only three classes of tenants for whom specific provision is made by section 6. If the matter rested there the case of the cultivating tenants who were not in possession during 1950-1951 but came in subsequently would appear to have been unprovided. In other words those who not having been in possession on the dates specified in section 6(1) and (2) were in possession on 23rd August, 1952, would not be protected. This should suffice to indicate that the Tribunals below are in error in holding that section 6 had provided for the two categories of cultivating tenants I have mentioned earlier.

In my judgment the proper way of reading the enactment is to regard section 7 as the pivotal provision in relation to cultivating tenants notwithstanding that it factually occurs after section 6 and to read section 6 as a rider to or an extension of this main provision in relation to a defined anterior period. Section 8 is really a part of section 7 defining the quantum of the statutory fair rent, the function of section 10 being to set out the obligations of tenants and the legal consequences of breaches on their part together with the machinery for the enforcement thereof.

The matter may be put in slightly different from in the following analysis. Section 7 provides the statutory terms on which "every cultivating tenant" shall hold the land. The tense used is present and the present tense does not exclude the prospective. Cultivating tenant is defined in section 2 (*d*) to mean a person who contributes his own physicial labour. . . in the cultivation of any land belonging to another under a tenancy agreement", to set out only the words which are material in the present context. The terms upon which a cultivating tenant of this type is to hold the lands are to be found in the several sub-clauses (*a*) to (*g*) of section 7. Section 8 is explanatory of the term as to rent in section 7. Section 9 makes provision for written evidence of the tenancy. The obligations cast on tenants on whom rights are conferred by section 7 are enforced by the provision as to eviction in the event of their non-observance. *Vide* section 10. If the opening words of section 7 stood without further statutory expansion, they would not include persons who had once cultivated the lands but had ceased to do so on 23rd August, 1952, but would take in all cultivating tenants then on the lands and in my opinion also every cultivating tenant who might be inducted thereafter, for, there are no words in section 7 excluding the latter class. The words " Every cultivating tenant " with which this section opens are, however, incapable of comprehending any persons who were not cultivating tenants on the date of the enactment for even the definition of a cultivating tenant in section 2 (*d*) uses only the present tense and would not therefore include a cultivating tenant who had cultivated long before the enactment. There were, however, classes of cultivating tenants who had once cultivated but had ceased to cultivate by reason of what the law considered to be an unjust eviction. It was to meet this special class of cases that section 6 was designed. This provision brought within its fold cultivating tenants who were in possession of the lands in the agricultural season of 1950-1951 or on the 1st of December, 1951, thus projecting *pro tanto* the Act backwards to the date named. The other sub-sections of section 6 provided that machinery by which the rights of these quondam cultivating tenants could be enforced as also the conditions subject to which they could be granted their rights. This in brief is the scheme of the enactment.

The opening words of section 7, *viz.*, " Every cultivating tenant ", afford statutory protection to every cultivating tenant and a tenant is not the less a cultivating tenant within those words, because he was not in possession of the land on 23rd August, 1952. The language employed is perfectly general and is by no means restricted to conferring rights upon cultivating tenants in possession on any particular date. Though there is a presumption against a statute having restrospective operation without specific provision therefor—and that is the function of section 6; there is no presumption that a statute applies only to a state of things on the date of the Act and not prospectively. If a person were a cultivating tenant as defined in section 2(*d*) the statute in section 7 sets out the conditions which govern his tenure. If the definition of cultivating tenant in section 2 (*d*) which also uses the present tense, were read into the opening words of section 7, that section would read :

> " Every person who contributes his own physical labour . . . in the cultivation of any land belonging to another and under a tenancy agreement express or implied shall hold the land on the following terms."

No difficulty is caused in treating this as [including cultivating tenants inducted subsequent to 23rd August, 1952 by reason of the provision as to duration of the tenancy, because under section 7(*f*) the statutory tenancy is terminated by efflux of time only at the end of the period of five years referred to in section 6, which means that it lasts until the commencement of the agricultural year 1957-1958. This construction which in my judgment is the only reasonable one of the enactment, is not contradicted by the language of the other sections. For instance sections 8,9 and 10 on their language would apply as much to cultivating tenants in possession of their holdings on 23rd August, 1952, as to those who were inducted subsequently. Apart from this there is no reason why, when the statute enacts terms in respect of persons who are cultivating tenants between 1952-1953 and 1957-1958 persons who come in at an intermediate period of time should not have the benefit of the statutory terms subject of course, to the termination of the statutory term after 1957-1958.

This construction is more than reinforced by a reference to the corresponding provisions in relation to pannaiyals who are the other class of persons engaged in agriculture for whom parallel provisions are made. Take for instance section 11 which determines the fair wage payable to pannaiyals. It cannot be that these wages could be demanded only by the pannaiyals actually in employment on 23rd August, 1952; but that in the case of persons employed subsequently, the contractual rate is enforceable even though this might be less than what is provided under section 11. Section 12 also could not on its language be restricted in its application to pannaiyals in employment under a particular landholder on the date of the enactment but it would apply equally to govern the relations of such agricultural labourers whose employment under any particular landowner commenced after 23rd August, 1952.

If the above is the reasonable construction of the provisions contained in sections 11 to 12 the other set of sections 7 to 10 should receive a similar interpretation in which event alone they would harmonise with each other and constitute an integrated piece of legislation. If so read it follows that section 12 which is common to tenants and pannaiyals and would be read as clothing the Conciliation Officer with authority to decide disputes not merely between persons who are landowner and cultivating tenant or pannaiyal on the date of the Act but also those with reference to persons between whom such relationship springs into existence after the enactment. The perfectly general language of section 10 which prohibits evictions of cultivating tenants otherwise than for reasons specified in that section making no distinction between the tenants restored to possession under section 6 and those who were cultivating tenants on the date of the enactment as also those who might be inducted later on would appear to reinforce the conclusion which I have drawn from an independent examination of the other provisions of the enactment.

In my judgment, the Tanjore Tenants and Pannaiyal Protection Act was applicable to and governed the rights of the present applicant before the Conciliation Officer. The applicant was entitled to have his application considered and adjudicated upon by the Conciliation Officer under section 13 of the Act. The orders of the Conciliation Officer and the Revenue Court refusing to do so are, therefore, set aside, the rule being made absolute.

The Conciliation Officer will proceed with the application and dispose of it in accordance with law. In view of the point raised not being covered by any earlier authority of this Court, there will be no order as to costs of this writ petition.

W. P. No. 632 *of* 1955.—This is also an application by a tenant invoking the assistance of the Conciliation Officer under section 13 of the Madras Act XIV of 1952. The applicant alleged that he had been in possession of the land on 1st December, 1951, whereas the case of the landowner who resisted the application was that the tenant had been inducted into the land subsequent to 23rd August, 1952. The Conciliation Officer and the Revenue Court upheld the contentions of the tenant and held that he had been cultivating the lands on 1st December, 1951. The landlord who is the second respondent in the other writ petition, *viz.*, W.P. No. 487 of 1955 has filed the present petition challenging the findings of the tribunals below on the ground that these orders were vitiated by an error apparent on the face of the record. In view of the conclusion which I have reached as to the scope of the Act in W. P. No. 487 of 1955, it is unnecessary to deal with W. P. No. 632 of 1955 on its merits, because it is admitted that the respondent tenant was let into possession as a tenant by the landlord subsequent to 23rd August, 1952. It follows that the writ petition fails and has to be dismissed. It is accordingly dismissed and the rule is discharged but in the circumstances without any order as to costs.

V.S.

W. P. No. 487 *of* 1955 *allowed.*
W. P. No. 632 *of* 1955 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Gordon Woodroffee Leather Manufacturing Co. .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (2) (xv)—*Permissible deduction under—Payment of a lump-sum to an employee at the time of retirement—If expenditure of a capital nature—When a permissible deduction.*

An expenditure which does not bring into existence any asset for the enduring benefit of the business of the assessee but is only a lump-sum payment to an employee who is retiring from the services of the assessee, in recognition of his past services, may, in the circumstances, be of a revenue nature. But in order to claim such expense as a permissible deduction under section 10 (2) (*xv*) of the Income-tax Act, it should be shown that the expenditure was wholly or exclusively for the assessees' business and the mere fact that it was not of a capital nature is not enough.

A pension or other allowance paid to a Director or employee of a firm solely in respect of the past services of the person concerned will be a permissible deduction only if it is made in the future interests of the business. There must be a connection between the purpose of the payment and the further pursuit of gain in the business in the sense that the payment was designed in the future interest of the business either to act as an incentive to the employee still in service, or to act as an incentive to employees to be recruited in future, *e.g.*,, accepting a lower salary in the expectancy of getting a gratuity on retirement. If the actual object of such payment is the conduct of the business on a profitable basis, with due regard to economy, then if the expenditure is not of a capital nature, it may be a permissible deduction. A payment of gratuity to a retiring employee in recognition of his past services, with nothing more, cannot satisfy the conditions of section 10 (2) (*xv*) of the Act and is no a permissible deduction.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act (XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act (VII of 1939), in 66 R.A. No. 849 (Madras Bench A) of 1952-53 (I.T.A. No. 299 of 1952-53) (Assessment year 1950-51) on its file for decision.

M. Subbaraya Ayyar and *V. Sethuraman*, for the Applicant.

C. S. Rama Rao Sahib, Special Counsel for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—Under section 66 (1) of the Income-Tax Act, the Appellate Tribunal referred the following question to this Court :—

> "Whether the sum of Rs. 40,000 paid to Mr. J. H. Phillips on his retirement from the service of the company was not an admissible deduction under section 10 (2) (*xv*) of the Income-Tax Act, 1922 ?"

The facts were never in dispute. The assessee, which was a private limited company, was incorporated in 1928 to carry on business in the manufacture of leather. Gordon Woodroffee & Co., Ltd., was the parent company, and after the incorporation of the assessee-company Gordon Woodroffee & Co., Ltd., were the managing agents. Mr. Phillips was employed in the parent company from 1922 to 1935, and thereafter he was employed in the assessee-company. He was manager of the assessee-company and also one of its Directors from 1940. Mr. Phillips decided to retire from service with effect from 4th April, 1949. He resigned his Directorship. At the meeting of the Board of Directors, dated 24th March, 1949, it was resolved, to accept Mr. Phillips' resignation with regret and to place on record the keen appreciation of the Board of his long and valuable services to the company. It was further resolved to convey to Mr. Phillips the best wishes of the Directors and the staff in his retirement from India. It was also resolved to recommend at the forthcoming Extraordinary General Meeting that Mr. J. H. Phillips be paid a gratuity of Rs. 50,000, and to recommend further that the parent company should be asked to contribute a portion of this sum. These recommendations were accepted. Rs. 50,000 was paid as a gratuity to Mr. Phillips, of which, however, the assessee-company paid only Rs. 40,000. The balance was paid by the parent company.

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*Case Referred No. 85 of 1953. 20th December, 1956.

This payment of Rs. 40,000 was claimed by the assessee as an allowable deduction in the assessment year, 1950-1951. The claim was disallowed by the Department and the Tribunal agreed with them.

The Tribunal held as recorded in paragraph 6 of the statement of the case, that the amount was not expended wholly and exclusively for the purpose of the business and that it was also capital in nature.

It is easier to dispose of the question, whether the payment of Rs. 40,000 constituted an expenditure of a capital nature. Every lump-sum payment is not necessarily a payment incurred by way of capital expenditure. The test most frequently applied is that laid down by Lord Cave in *British Insulated and Helsby Cables, Ltd.* v. *Atherton* :[1]

> "But when an expenditure is made not only once and for all, but with a view to bring into existence an asset or advantage for the enduring benefit of trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

Judged by that test, it should be obvious that the expenditure in question was not of a capital nature. The payment of Rs. 40,000 did not bring into existence any asset for the enduring benefit of the business the assessee carried on. Nor did it secure to it an advantage for the enduring benefit of its business. It was a payment to an employee who retired from the service of the assessee-company in grateful recognition of his past services, which the assessee-company justly assessed as valuable services. It should be noted that the good faith attendant on the transaction was never in doubt.

That it was not an expenditure of a capital nature does not solve the question we have to answer ; the claim has still to satisfy the other requirements of section 10 (2) (*xv*) of the Act. Was it laid out or expended wholly or exclusively for the assessee's business still remains to be answered.

The two cases on which text-book writers both in England and in India have based their comments, with reference to such lump-sum payments of gratuity to retiring servants, are *Smith* v. *The Incorporated Council of Law Reporting*[2] and *Hancock* v. *General Reversionary and Investment Co. Ltd.*[3].

In *Smith* v. *The Incorporated Council of Law Reporting*[2], the Incorporated Council paid a sum of £1,500 as gratuity on the retirement of one of its reporters. The question was, whether this £1,500 should be included in the profits of the assessee (The Incorporated Council) assessable to income-tax. The Commissioners decided that it was not. That decision was confirmed by Scrutton, J., when the Crown appealed. The learned Judge pointed out that the Commissioners had found as a fact that £1,500 was money wholly and exclusively laid out or expended for the purpose of the trading and proceeded to determine the question, was there evidence upon which they could find that. The learned Judge observed :

> "What they find is that though the Reporters have no legal right to a payment on retirement, it has been the habit of the Respondents to give a gratuitous pension or to make a gratuity of a lump-sum on retirement to a Reporter after long service. One cannot help using one s ordinary knowledge of human nature to know that in some cases the expectation of gratuities may materially affect the amount of salary. When I find that the Commissioners have found that it is the habit of these employers to give their Reporters gratuitous pensions or gratuities of lump-sums, I cannot help seeing that there is evidence upon which the Commissioners, judging from facts, may find that those payments were made in the way of their trade, because they at any rate may affect the amount of ordinary salary which they pay to their Reporters."

In *Hancock* v. *General Reversionary and Investment Company, Ltd.*[3], the assessee-company sought to charge as a trading expenditure a lump-sum which it had paid for the purchase, for the benefit of a former actuary and secretary of the company of an annuity equal in amount to the pension, which had been awarded to him by a resolution of the company. Lush, J., held that the lump-sum paid to purchase the annuity was an expenditure incurred in the business not in the nature of

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1. L.R. (1926) A.C. 205 : 10 T.C. 155.
2. 6 T.C. 477 : L.R. (1914) 3 K.B. 674.
3. (1918) 7 T.C. 358.

capital expenditure, and was an admissible expense in computing the company's profits assessable to income-tax. Lush, J., observed at page 371:

> " . . . . I think that it necessarily follows. . . . that £4,994 should be treated, as the pension was treated, as an ordinary business expenditure, and that the deduction should be allowed. It is the pension in another form ; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense. It seems to be as impossible to hold the fact that a lump-sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that, if any employer were under a voluntary arrangement with his servant to pay the servant a year s salary in advance instead of paying each year s salary as it fell due, he would be making a capital outlay."

There is no scope for extending to the claim of the assessee in this case the principles laid down in *Hancock* v. *General Reversionary and Investment Company, Ltd.*[1]. It was not, as if Mr. Phillips was paid a lump-sum gratuity in lieu of any annual pension, to which he would otherwise have been entitled.

In our opinion, the principle laid down in *Smith* v. *The Incorporated Council of Law Reporting*[2], either cannot be extended to the assessee's claim. The Tribunal recorded:

> " . . . there is nothing to indicate that Mr. J. H. Phillips had accepted a lower salary in the hope of getting a gratuity. He could not have had any such hope as there was no such practice in the assessee-company. . . . . ."

It should be remembered it was found in *Smith* v. *The Incorporated Council of Law Reporting*[2], that it was the habit of the Incorporated Council of Law Reporting to give a gratuitous pension or to make a gratuity of a lump-sum on retirement to Reporter after long service. No precedent for the payment of such a gratuity was proved by the assessee-company before the Tribunal. During the course of arguments before us, we offered an opportunity to learned counsel for the assessee to produce evidence, if any, of similar payments having been made in the past either by the assessee company or by its parent company. Had any such evidence been forthcoming, we would have considered the desirability of allowing the assessee to place that material before the Tribunal and to call for a further statement of the case. But no real evidence of similar payments in the past was forthcoming. Of course, a precedent for such a payment would only be one of the relevant factors to be taken into consideration with its proper probative value. We should not be understood to lay down that in the absence of precedents a claim under section 10 (2) (*xv*) of the Act must necessarily be disallowed. Every company has to make a beginning, and a first payment of its kind does not cease to be deductible if it satisfies the requirements of section 10 (2) (*xv*).

What was the nature of the payment made to Mr. Phillips is the question for consideration. It was obviously paid to him in grateful and possibly just recognition of the valuable services he had rendered to the company. But those services had already been rendered. The payment was certainly not to secure the services of Mr. Phillips in the future. The assessee did not establish that the payment was designed in the interests of the future business of the company, either to act as an incentive to the employees still in service, or to act as an incentive to the employees to be recruited in future. As the Tribunal has in effect found, expectancy of a gratuity on retirement did not play any part either when Mr. Phillips joined the service of the company, or when any other employee entered its services. Apparently the company has now a scheme of a contributory provident fund which, of course, is quite distinct from the expectancy of a gratuity on retirement. Thus the position is the normal service conditions of the assessee company did not provide for any expectancy of any gratuity on retirement either in the past or probably in the future. It is with reference to these facts that we have to decide the question, whether the payment of Rs. 40,000 to Mr. Phillips satisfies the test, whether it was wholly or exclusively expended for the business of the company. Gratitude for past services expressed in a monetary form by itself, and with nothing more, may not satisfy that test.

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1. (1918) 7 T.C. 358.
2. L.R. (1914) 3 K.B. 674 : 6 T.C. 477.

In the "Principles of Income Taxation" by Hannan and Farnsworth, at page 478, the learned authors stated :

> " Arrangements for the retirement of employees are a necessary part of the operations of a business. Consequently financial provision by the employer for such a happening is more or less directly associated with the earning of the profits. An employee is likely to give better service when he can reasonably expect to receive a gratuity or pension upon the termination of a long period of employment. The expectation, though it may rest only upon the fact that similar provision has been made for former employees, is calculated to promote better relations between employer and employee, with beneficial results to the business concerned.
>
> For these reasons it is now generally recognised the payments made by an employer to his retired employees are a proper charge in arriving at the taxable profits of his business. Such payments are in an entirely different category from a lump-sum set aside to establish a pension fund similar to that in *Atherton's case*[1]. But even payments of the former class may be made in circumstances so exceptional that their admissibility as deductions is liable to be challenged by the Revenue authorities."

Learned counsel for the department invited our attention to a passage from Gunn's "Commonwealth Income-tax Law and Pratice," Fourth edition. Section 51 of the Australian Act provided

> " Losses and outgoings to the extent, to which they are incurred in gaining or producing the assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income shall be allowable deductions except to the extent to which they are losses or outgoings of capital ".

Though not in *pari materia* with section 10 (2) (*xv*) of the Income-tax Act one of the tests imposed by section 51 is that the expenditure should be necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.

In paragraph 1195 at page 421 the learned authors stated :

> " A payment to an employee on his retrenchment or retirement is deductible under section 51 only where it can be established that the payment was in the future interests of the tax-payer's business. The position is otherwise under the specific provisions of section 78 (1) (*c*) where an allowance is granted for payments in consideration of the past services of employees."

Section 78 (1) (*c*) provided for a deduction of

> "Pensions, gratuities, or retiring allowance to persons who are or have been employees or dependents of the employees to the extent to which in the opinion of the Commissioners those sums are paid in good faith in consideration of the past services of the employees in any business operations which were carried by the tax-payer."

There is no analogous provision in the Indian Income-tax Act. With reference to a claim under section 51 of the Australian Act, somewhat analogous to section 10 (2) (*xv*) of the Indian Act, the learned authors extracted a passage in an Australian decision :

> " It has never been held that a pension or other allowance paid by a tax-payer in business to a retiring or deceased director or employee or his dependents solely in respect of past services of the director or employee is an allowable deduction under income-tax provisions dealing with the allowance of business outgoings generally. Whenever such a payment has been held to be deductible the decision has been based on the fact that it was made in the future interests of the business. . . . . There must be a connexion between the purpose of the payment and the further pursuit of gain. There must be some facts which justify the inference that the outgoing was incurred to conduce to that end ".

These principles, in our opinion, could well be invoked in applying the provisions of section 10 (2) (*xv*) of the Income-tax Act.

Two other cases were referred to, though they did not themselves deal with payments of gratuities to a retiring servant.

In *B. W. Noble, Ltd.* v. *Mitchell*[2], the Director so dismissed was only entitled to receive his salary then due. He could also be required to sell his shares to the other Directors at par. He would also have to surrender for cancellation certain notes issued by the company entitling him to participate in the surplus profits. The market value of the shares was considerably above its face value, because the shares paid a dividend of 677 per cent. Circumstances arose in 1920 and 1921,

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1. (1925) 10 T.C. 155 : L.R. (1926) A.C. 205. 2. (1927) 11 T.C. 372.

in which the company might have been justified in dismissing one of the Directors. But to avoid publicity injurious to the company's reputation it entered into a negotiated settlement with the Director, under which he retired from the company and the company paid him £19,200. The company's claim to deduct this payment was allowed. Rowlatt, J., held,

> ". . . . . Although the largeness of the figures and the peculiar nature of the circumstances perplex one. . . . . this is not more than a payment to get rid of a servant in the course of the business and in the year in which the trouble comes. I do not think it is a capital expense; and I have held that it is an expense incurred in the conduct of the business."

Lord Hanworth, M.R., agreed that the payment should be treated as a revenue item, and not as a capital item. He observed at page 420:

> "It seems to attain more closely to *Hancock's case*[1] and the *Law Reporting case*[2] than to other cases. . . . It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made in order not to secure an actual asset to the company but to enable them to continue, as they had in the past, to carry on the same type and high quality of business unfettered and unimperilled by the presence of one who, if the public had known about it, might have caused difficulty to their business and whom it was necessary to deal with and settle with at once."

The principle laid down in *B. W. Noble, Limited* v. *Mitchell*[3], was followed by the High Court of Australia in *W. Nevill & Co., Ltd.* v. *Federal Commissioner of Taxation.*[4] There again it was an unwanted Director that the company got rid of, and it secured the cancellation of the agreement in his favour by a payment of £2,500. The High Court held that this sum of £2,500 was a "loss or outgoing incurred in gaining or producing assessable income", to satisfy the requirements of the statutory provisions in Australia.

Latham, C.J., observed at page 301:

> "No expenditure, strictly and narrowly considered, in itself actually gains or produces income. It is an outgoing, not an incoming. Its chracter can be determined only in relation to the object which the person making the expenditure has in view.
>
> If the actual object is the conduct of the business on a profitable basis with that due regard to economy which is essential in any well-conducted business, then the expenditure (if not a capital expenditure) is an expenditure incurred in gaining or producing the assessable income. If it is not a capital expenditure it should be deducted in ascertaining the taxable income of the tax-payer."

Though, as we said, *Nevill's case*[4] did not deal with the payment of a gratuity voluntarily made by the employer to a retiring employee, the general obervations of Latham, C.J., which we have extracted above, explain the viewpoint from which to judge whether an expenditure was laid out by the assessee wholly or exclusively for the purpose of his business.

Before we revert to the requirements of section 10 (2) (*xv*) of the Act, we have to refer to two features of the order of the Tribunal. The Tribunal pointed out that Mr. Phillips was in receipt of a salary and a 2½ per cent. commission in addition to his salary and recorded:

> "In these circumstances, it is idle to contend that the payment made on resignation of the employee was in return for long and faithful services rendered."

We are really unable to appreciate the scope of these observations or discover what the basis for them was. As we said, that the company acted in good faith was never really in dispute. The genuineness of the payment was not in dispute. That Mr. Phillips rendered valuable services to the assessee-company and that the company was conscious of that and was justly grateful to him, for that were not matters in dispute either. As the learned counsel for the assessee pointed out, the Tribunal failed to understand the scope of the payment; it failed to view it from the viewpoint of commercial expediency. The Tribunal then referred to the fact that the expenditure was not debited to the profit and loss account, but was debited to the appropriation account, thereby strongly indicating that it was an extraordinary payment or a payment made in the nature of capital expenditure. Every extraordinary payment is not necessarily an expenditure of a capital nature. Entry in the accounts by itself may not conclude the question, what was the nature of the payment. Netither of the two features to which we have referred above, which were taken into consideration by the Tribunal in disallowing the assessee's claim, was really relevant. But that does not in any way affect our decision in this case on the question, whether the claim of the assessee falls within the scope of section 10 (2) (*xv*) of the Act.

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[1] (1918) 7 T.C. 358.

[2] (1914) 6 T.C. 477 : L.R. (1914) 3 K.B.

[3] (1927) 11 T.C. 372.

[4] 56 C.L.R. 290.

We have already pointed out that to bring a claim within the scope of section 10 (2) (*xv*) it is not enough to show that it was not in the nature of a capital expenditure. The further test of section 10 (2) (*xv*) has to be satisfied; was the amount laid out or expended wholly and exclusively for the purpose of the business of the assessee-company. In this case the sum of Rs. 40,000 was paid as gratuity on retirement for the valuable services rendered by the employee, Mr. Phillips. There was no evidence to show that at any time before the payment was resolved Mr. Phillips expected to receive it or even that the company contemplated its payment. No doubt the payment was for past services rendered. But it was not remuneration that the company was bound to pay for those services. The payment of gratuity was voluntary. Even a voluntary payment could satisfy the requirements of section 10 (2) (*xv*). In this case, there was no evidence to show that it was in the future interests of the business of the assessee that the expenditure was incurred. In the case of a payment of a gratuity to a retiring employee recognition of his past services, with nothing more cannot, in our opinion, satisfy the requirements of section 10 (2) (*xv*), even if those requirements are judged from the viewpoint of commercial expediency, as it always should be when a claim arises under section 10 (2) (*xv*). Was the expenditure incurred in the future interests of the business of the assessee? Was there any connection between the purpose of the payment and the further conduct of the business of the assessee? These are the tests to be satisfied before it could be said that in paying the gratuity money was laid out or expended wholly and exclusively for the purpose of the business of the company. These tests the assessee did not satisfy in this case.

Mr. Subbaraya Iyer, learned counsel for the assessee, pointed out that the company accepted it as a legitimate payment. But obviously that is not enough to sustain a claim under section 10 (2) (*xv*). As we said, the good faith attendant on the transaction was never in dispute. The action of the company in rewarding a trusted employee after long years of faithful services by making him a substantial payment may be laudable, but the question is, is it a claim that could be allowed under section 10 (2) (*xv*) of the Act. That question, in the circumstances of this case, has to be answered in the negative.

We answer the question in the negative and against the assessee. The assessee will pay the costs of this reference. Counsel's fee. Rs. 250.

R.M. ——— *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

M. P. V. Sundararama Iyer & Co. .. *Appellants**

v.

V. V. C. R. Murugesa Mudaliar .. *Respondent.*

Sale of Goods Act (III of 1930), *sections* 35, 54 (2)—*Scope—Option to seller to resell if buyer fails to take delivery—Duty of seller to intimate to buyer that goods are ready for delivery—Advance paid by the buyer—Right to refund of.*

Where the term of the contract was, "If the buyer fails to take delivery as required by the seller's notice, the seller shall have the right to sell such goods. . . . ."

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* Appeals Nos. 127 and 933 of 1952. 11th April, 1956.

Held: That this term is to be construed as an 'express contract' mentioned in section 35 of the Sale of Goods Act and it is the duty of the seller to intimate to the buyer that the goods are ready for delivery and ask him to tender the price and take delivery of the goods. Where the buyer is not so intimated, he cannot be mulcted with any liability for having broken the contract. In these circumstances the seller is not entitled to any damages and the buyers would be justified in asking for refund of the advance which cannot be considered as a deposit as understood in English Law.

Appeal against the Decree of the Court of the Subordinate Judge of Madurai, dated 28th March, 1951 and passed in O.S. No. 118 of 1946.

V. C. Gopalaratnam and *L. V. Krishnaswami*, for Appellants in Appeal No. 127 of 1952 and for Respondent in Appeal No. 933 of 1952.

K. S. Ramamurthi and *V. Seshadri*, for Respondent in Appeal No. 127 of 1952 and *K. Vaitheswaran*, for Appellant in Appeal No. 933 of 1952.

The Judgment of the Court was delivered by

Govinda Menon, J.—The plaintiffs in O.S. No. 118 of 1946 on the file of the Sub-Court, Madurai, are the appellants in Appeal No. 127 of 1952 and the plaintiff in O.S. No. 31 of 1950 on the file of the same Court is the appellant in Appeal No. 933 of 1952.

The subject-matter of these two suits related to cross-claims and as such in this judgment the plaintiffs in O.S. No. 118 of 1946 who are the defendants in O.S. No. 31 of 1950 will be known as the plaintiffs-appellants and *vice versa* the defendant in O.S. No. 118 of 1946 who is the plaintiff in O.S. No. 31 of 1950 will be known as the defendant-respondent. The facts which have given rise to these proceedings can be summarised shortly in the following way: There were five contracts evidenced by Exhibits A-1 to A-5 entered into between the parties by which on the whole 133 bales of cotton yarn were agreed to be purchased by the plaintiffs for which purpose a sum of Rs. 10,560-8-0 was advanced to the defendant. On the ground that the defendant did not deliver the goods contracted for the plaintiffs have filed O.S. No. 118 of 1946 for the return of the advance amount with interest thereon totalling to Rs. 12,404-15-3. The defendant on the other hand has claimed damages on the ground that the plaintiffs-purchasers have committed breach of contract and failed to take delivery of the goods by paying the price and therefore the defendant had to sell the goods which fetched a lower price than was contracted, the difference between the contract price and the price fetched at the resale being Rs. 13,308-2-0 which along with the brokerage paid by the defendant came to Rs. 13,421-2-0. Out of this, deducting the deposit amount of Rs. 10,560-8-0 the balance came to Rs. 2,860-10-0 from which interest at four per cent. per annum on Rs. 10,560-8-0 as per *vaddi chittai* of Rs. 63-15-5 was deducted. The balance of Rs. 2,796-10-7 with interest thereon at six per cent. per annum from the date of sale namely 11th November, 1943, till the date of the suit came to Rs. 3,300-13-2 and the defendant claimed a sum of Rs. 3,300.

The learned Subordinate Judge found that the defendant had not committed any breach but on the other hand the plaintiffs were not ready and willing to perform their part of the contract. But on the finding that there is no evidence as regards the market price or the price which the goods would have fetched had they been sold on 31st October, 1943, which was the last date for delivery of the goods, the defendant's suit for damages was also dismissed on the ground that the amount of damages has not been proved.

It has been held in *Rattamma* v. *Krishnamurthi*[1], which decision has not so far been overruled or dissented from at least no case to that effect has been brought to our notice—that a sum of money paid as advance by the purchaser to the vendor in respect of the sale of goods can be recovered by the purchaser even though the transaction of sale fell through owing to the purchaser's default, unless the vendor proves a contract express or implied, that the money paid as advance should be treated as security for the purchaser's fulfilment of the bargain and as such liable to be forfeited on his default. The learned Judges refer to *Collins* v. *Stimson*[1] and *Howe* v. *Smith*[2], regarding the import of the term "deposit" and observing that the connotation put upon it in the English Courts should not be applied to Indian contracts, held that the defaulting purchaser is entitled to a refund of the advance paid. Even if, therefore, the plaintiffs broke the contract they are entitled to get back their advance but since damages in O.S. No. 31 of 1950 has been computed by deducting the advance paid from the actual loss sustained by the defendant at the resale, and, therefore, if we are to hold that the defendant has sustained damages and that has been proved to the satisfaction of the Court, then the set-off claimed in O.S. No. 31 of 1950 can be rightly allowed. If on the other hand the defendant has not proved what exactly was the market-value of the goods on 31st October, 1943, as the learned Subordinate Judge has found then he will not be entitled to damages over and above the advance which has been debited towards the quantum of damages.

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[1] (1927) 54 M.L.J. 40.

We have, therefore, to find out from the evidence whether there has been a breach of contract and if so, who is liable for it.

Exhibits A-1 to A-5 are the contracts in question and they range between 29th August, 1943, which is the date of Exhibit A-1 and 7th October, 1943, the date of Exhibit A-5. As the terms and conditions of each of them are similar in character we may take Exhibit A-1 as a sample contract. Under that, the buyers who are the plaintiffs agreed to purchase from the defendant who is the seller, subject to conditions and terms noted therein, a certain quantity of yarn and accepted the the seller's godown delivery at the seller's option between the first and the last date of October, 1943 and to pay the full value for the same and to accept the goods delivery as per the contract terms of Messrs. The Madurai Mills Limited with the seller. Clause (4) of this contract is to the following effect :—

> "If the buyer fails to take delivery as required by the seller's notice, the seller shall have the right to sell such goods by public or private sale at buyer's risk."

These contracts were entered into through a broker, Jambu Subbarama Iyer, who has been examined as D.W. 3. The contracts are in printed forms and relate to yarn issued by Messrs. Madura Mills Limited. Exhibit A-1 is with respect to 38 bales of October delivery of various kinds at prices mentioned in the contract. Exhibit A-2 is for 25 bales to be delivered in October. Exhibit A-3 is with respect to 20 bales of 40 counts and Exhibits A-4 and A-5 relate to 25 bales each. In all, the quantity of yarn agreed to be purchased was 133 bales out of which on 5th November, 1943, the plaintiffs took delivery of 15 bales of the October delivery and the balance of 118 bales had to be taken delivery of.

The plaintiffs' case is that these goods not having been delivered by 31st Octber, 1943, the defendant has committed breach of contract, in which case the plaintiffs are entitled to a refund of the advance paid. *See* Exhibit A-15, dated 9th November, 1943. It is the defendant's case that there was no necessity to deliver the goods before 31st October, 1943, for the reason that when 15 bales were offered for delivery on 26th October, 1943, under Exhibit A-7 and the plaintiff took delivery of those 15 bales on 5th November, 1943, the parties undertstood that the remaining quantity of goods need be delivered only later. The defendant further states that in reply to Exhibit A-7 the plaintiffs wrote Exhibit A-8, dated 30th October, 1943, claiming rebate from the price to be paid by the plaintiffs, of allowances and concessions which the Madura Mills would give to the defendant and unless that was settled the plaintiffs did not want to take delivery. It was the question of reducing the agreed price by allowances or concessions granted or to be granted to the defendant by the Madura Mills that prolonged the period under which the plaintiffs agreed to take delivery. Though the contracts were *vaida* contracts or forward ones, in the present case the correspondence between the parties show that delivery need not be before 31st October, 1943, so argues the defendant's counsel. Under Exhibit A-11, dated 4th November, 1943, the defendant informed the plaintiffs that if he got allowance or rebate from the Harvey Mills for the bales sold in September,

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[1] (1883) L.R. 11 Q.B.D. 142.

[2] (1884) L.R. 27 Ch.D. 89.

October and November, 1943, he would give the whole of it to the plaintiffs and obtain a receipt therefor. Under these conditions, Exhibits A-7, A-8 and A-11 would, according to the defendant, show that there was no imperative necessity to have delivery of the goods before 31st October, 1943. The defendant also pleaded that according to trade usage and custom though the contract was specifically mentioned as *vaida* contract for October, the goods need be delivered only in the succeeding month. The learned Subordinate Judge was not prepared to accept this plea of a custom or trade usage and nothing has been urged before us against the conclusion arrived at by the lower Court.

That the goods were not delivered in the month of October, 1943, but were resold later has not been questioned before us. It is admitted that the goods were sold by private sale under condition (4) of the contract. 113 out of 118 remaining bales were sold through the broker Jambu Subbarama Iyer and Exhibit B-8 is the receipt passed by him for sale of 113 bales. This is spoken to by Jambu Subbarama Iyer as D.W. 3. D.W. 1 deposed that the remaining bales were sold to one Hajee Moosa Sait and Exhibit B-22 is the concerned bill. Exhibit B-8 shows that the sale took place on the 10th of November, 1943, in respect of 113 bales and Exhibit B-22 is with respect to the sale on 12th November, 1943. It is seen from Exhibit A-19, dated 11th January, 1943 and Exhibit A-21, dated 12th November, 1943 that the defendant offered to deliver 43 and 10 bales respectively and stated that unless the plaintiffs took delivery of those bales the goods will be sold at the plaintiffs' risk.

What then, is the construction to be put upon the clauses in the agreement? According to the learned counsel for the plaintiffs-appellants the condition (4) of the contract presupposes that the seller being entitled to deliver the goods at any time during the delivery month, the initiative must be with the seller to notify the buyer that he is prepared to give delivery and if such notice is given and the buyer does not take delivery or comply with the notice, the seller has the right to resell the goods treating the contract as terminated. Therefore this condition contemplates that the seller shall notify the buyer when he requires the buyer to take delivery and the buyer must accept it any time during the month. Hence as the seller has to take the initiative and inform the buyer the time of the delivery of the goods, an application by the buyer is not contemplated.

A contract containing a simlar clause, as the one before us, came up for construction before Gentle, J., in C. S. No. 18 of 1938 wherein the present plaintiffs were the plaintiffs but the defendants were different, and the learned Judge's interpretation can surely be treated though not as a binding authority but as of great value and assistance. The learned Judge referring to clause (4) stated thus :—

> "By condition (4) of the suit contracts it is provided that if the buyer fails to take delivery as required by the seller's notice, the seller shall have the right to sell such goods. The seller being entitled to deliver at any time during the delivery month, he must notify the buyer when he is prepared to give delivery and if there is non-compliance with this notice he has the right to re-sell, thus treating the contract as terminated. This condition contemplates that the seller shall notify the buyer when he requires him to take delivery and the buyer must accept delivery at any time during t e month. Since the buyer must take delivery in accordance with the seller's requirements, application by him for delivery is not contemplated. Elsewhere, the contract provides that the buyer must pay for the goods against delivery and therefore on receipt of notice from the seller he must be ready to pay the price and to take delivery in accordance with the requirements in the notice. Since these things must be done when notified by the seller, application for delivery is unnecessary and is not contemplated in the contract. The provision that if the buyer fails to take delivery after receipt of notice the seller has the right to sell the goods at the buyer's risk, does not in my view allow the seller to give or withhold notice at his wish and may await application by the buyer for delivery. The contract contemplates a notice being sent and upon its receipt, the buyer must comply with it."

Again the learned Judge observed ;

> "The wording in condition (4) of the suit contracts is what is contemplated in section 35 by the words 'apart from any express contract'. In my view the express contract was that the seller hould notify the buyer when delivery would be given and when he would be required to take it."

Therefore, there has been an express contract which would not make the general provisions of section 35 of the Sale of Goods Act applicable. If this decision is to be followed, then there is no doubt whatever that there is no obligation cast upon the plaintiffs to apply for delivery until the notice is received. But the defendants' learned counsel Mr. K. S. Ramamurthi contends that the expression " as required by the seller's notice " relates to a point of time after the period of *vaida* has expired and before the seller proposes to resell the goods. It is according to the learned counsel, in a sense an intimation to a party who has broken the contract that the goods would be sold at his risk. We do not think that such a far-fetched construction is possible. The opening words of condition (4) namely " that if the buyer fails to take delivery " surely connotes delivery is contemplated by the contract and not after the breach has taken place. We are also fortified in this view by the preamble portion of the contract where mention is made of the buyer accepting the seller's godown delivery at the seller's option between the first and last day of the month. This would mean that the initiative has to be taken by the seller to inform the buyer that the goods are ready for delivery. But Mr. Ramamurthi contends that according to section 35 of the Sale of Goods Act a statutory liability is cast upon the buyer to ask for delivery apart from the express contract and so the seller is not bound to ask the buyer. He contends that the condition as construed by Gentle, J., will not be an express contract. It is argued that assuming that there is an obligation on the vendor to inform the purchaser before 31st October, 1943, the defendant, had offered delivery but the plaintiffs failed to take delivery thinking that they would get some concession or rebate or allowance which the Madura Mills would pay to the defendant. Next it is argued that assuming that time is the essence of the contract in these *vaida* matters, on account of the conduct of the parties the plaintiffs have extended the time by awaiting for the rebate. Lastly it is urged that the plaintiffs having in their income-tax return acknowledged the liability to pay the balance of the amount to the defendant as claimed in O.S. No. 31 of 1950, have admitted their liability. In Exhibit B-18, plaintiffs' ledger for 1943-44, at page 240, there is a credit entry for Rs. 13,308-2-0 on 17th March, 1944, in the name of the defendant and it is on that footing that the plaintiffs got a rebate of a large sum in the Excess Profits Tax.

The decision, therefore, depends to a large extent on the question whether the plaintiffs should apply for delivery or that the defendant should intimate to the plaintiffs that the goods are ready for delivery. As stated already the view taken by Gentle, J., is in favour of the plaintiffs' contention that clause (4) of Exhibit A-1 amounts to an express contract which would take the case out of the generalisation contained in section 35 of the Sale of Goods Act. It is urged by the learned counsel for the defendants that the buyer has not applied for delivery and if there is no express contract, the breach has been committed by the plaintiffs. The absence of any specific pleading or averment in the plaint that clause (4) of Exhibit A-1 amounted to an express contract is pointed out by the defendant's counsel as indicative of the plaintiff's frame of mind at the time of the filing of the suit. Except saying that the plaintiffs were ready and willing to pay the price and take delivery of the bales and calling upon the defendant to give delivery of the goods, there is no mention that a duty was cast upon the defendant to give notice to the plaintiffs regarding the availability of the goods and his readiness to deliver them. On the other hand, it is stated that the defendant has specifically put forward his case in paragraph 8 of his written statement that the plaintiff did not pay the price and ask for delivery in October, 1943. If they had done so, it would have been not only the easiest thing for the defendant to do, but also very profitable for him to have purchased the bales at lesser cost and given delivery thereof. Having committed default themselves, the plaintiffs cannot take advantage of an imaginary default on the part of the defendant. Not only is there anything in the correspondence showing that the plaintiffs demanded delivery but even the available piece of evidence according to the defendant is the other way. No doubt P.W. 1, the managing partner of the plaintiffs' firm, stated that on 31st October, 1943, he phoned to the defendant asking him to deliver and sent word through his clerk, Krishna Rao. But we do not think that oral evidence of this kind would be of much use. This Krishna Rao has not been examined on the side of the plaintiffs.

The case of the defendant is very much weakened by the admission made by D.W. 1 who has been the defendant's kariasthan for twenty years. In cross-examination he states that delivery is "our godown delivery" as the contract provides for "sellers godown delivery". Further the witness goes on to say as follows :—

> *Q.* "You said that plaintiff should apply for delivery. On what date can he insist upon delivery ?
>
> *A.* On no date can he insist. Unless we intimate to the plaintiff that goods were ready for delivery on a particular date he cannot apply."

We agree with Mr. V. C. Gopalaratnam, learned counsel for the plaintiffs, that the expression "seller's option" in the preamble to Exhibit A-1 means that the seller should first intimate to the buyer of the availability of the goods and the readiness to deliver, and until the seller exercises that option the buyer cannot do anything and therefore, the important factor is the communication of the date by the seller when the goods will be delivered, in which case alone the buyer can apply for delivery. Learned counsel also contended that performance of contract after such notice is simultaneous with the payment of price and delivery of the goods, and if after intimation by the seller of the delivery on a particular date the buyer does not tender the price and get delivery then the contract is broken on that date. But the respondents rely upon that part of the evidence of P.W. 1, where he stated that the defendant promised to pass on to him the concession, which he got for September, October and November deliveries. About the 15th of October, defendant agreed to pass a letter to him undertaking to pass on to him the concession in respect or September, October and November deliveries but he did not give him such a letter. In these circumstances it is urged it is possible to infer that the plaintiffs allowed the defendant to extend the time for delivery by making him believe that unless the concessions were passed over he would not insist upon the delivery of goods.

There is a further argument put forward by Mr. K. S. Ramamurthi that the interpretation put upon clause (4) by Gentle, J. was *obiter* because on the facts of that particular case it is shown that the plaintiffs, there, duly called upon the defendant to deliver the goods after receiving the price payable, but the defendant failed and neglected to effect delivery. Such being the case in any event it was unnecessary to interpret clause (4) as an express contract. We do not think that that is the correct interpretation to be put upon that clause. It seems to us, therefore, that the obligation is upon the defendant to intimate to the plaintiffs the fact of the goods being ready for delivery.

But the further question is whether the plaintiffs by their conduct made the defendant believe that such a thing was unnecessary and in this connection letters, Exhibits A-9, A-10, A-11 and A-13, may usefully be referred to. Under Exhibit A-9 the defendant promised to give to the plaintiffs any allowance which he would get from the manufacturers, Messrs. Harvey Mills considering the ceiling rate and the rates at which the goods have been sold to them. Therefore on 22nd October, 1943, the defendant did not intimate to the plaintiffs of the availability of the goods. Again under Exhibit A-10, dated 31st October, 1943, the defendant speaks of 32 bales being ready for delivery within 1st November, 1943 and asks the plaintiffs to take delivery of the same. The further statement is that since the plaintiffs have to take delivery of a large number of bales in the month of October in the mill the defendant trusted that the plaintiffs will make arrangement to take delivery without delay. He also promised that with regard to September, October and November contracts he would accept the decision arrived at by the Association. Exhibit A-11, dated 4th November, 1943, contains an unequivocal agreement to give the entire rebate or allowance to the plaintiffs if the defendant got any from the Harvey Mills. Exhibit A-31, dated 3rd November, 1943, also contains indications that the defendant would take delivery instructions and would supply finance. But is the fact that the plaintiffs have not demurred to these letters a sufficiently significant consideration ? It is also urged that because Exhibit A-12 dated 5th November, 1943, contains an offer that under October contract 15 bales of 40 counts, 2 bales of 30 counts and 10 bales of 32 counts in all 27 bales were ready for delivery and that the plaintiffs should within 24 hours of the receipt of the letter pay the amount and take delivery of the bales this would indicate that the parties had agreed to postpone the delivery even after 31st October, 1943. But then, it has to be remembered that with respect to the letter, Exhibit A-7, dated 26th October, 1943, which also related to October delivery the offer was made before the *vaida* time expired and it was the goods referred to therein that was taken delivery of on the 5th of November.

There is nothing on the evidence to lead one to the conclusion that after 31st October, 1943, the plaintiffs had either by express correspondence or by implication deducible from their conduct agreed to the take delivery of any goods offered. Mr. Ramamurthi invited our attention to the passages in the evidence of P.W. 1 to the effect that when a question was put to him " You were not prepared to take delivery of October bales unless a letter was given to you agreeing to pass on the entire concession to the reply was that it had reference only to September delivery ". " If the October delivery was made I was bound to have accepted, letter or no letter." We also find that P.W. 1 had stated that he was ready and willing to take delivery of the October *vaida* during the whole month.

Learned counsel also relied upon the testimony of the broker, Jambu Subbarama Iyer, examined as D.W. 3, that in respect of October *vaida* he did not ask anything of the plaintiffs. In October he told the plaintiffs that bales were ready to be delivered and P.W. 1 said that if the difference was given he would take delivery. This witness also stated that the *vaida* delivery can be made within 15th of the month following the month described as *vaida* month. The vendee has to ask or apply for delivery and that plaintiffs never applied for delivery.

If the testimony of D.W. 3 had been supported by any documentary evidence we would have placed reliance upon it but as the correspondence shows that there is no written record to indicate that the plaintiffs had demanded that their taking delivery of October *vaida* would be conditional to the passing on of the concession or rebate from the Harvey Mills. It may be, though there is no evidence to justify it, that the defendant finding that the price of yarn was declining wanted to induce the plaintiffs to take delivery by offering a bait as it were on the score of rebate or concession. It is also worthy to note that in Exhibit A-8 the plaintiffs were accusing the defendant of not complying with the promise made of the passing of the concession or allowance for the October delivery. But there is nothing to show in that letter that the delivery of October *vaida* goods depended upon the condition precedent of the passing of the allowance or concession. Exhibits A-31 and A-11 do not contain any notice of the goods being ready for delivery. It is only on the 5th of November, 1943, under Exhibit-A-12 that the defendant offered to deliver 27 bales. Under these conditions and especially since we are in agreement with the construction put upon a clause similar to clause (4) of Exhibit A-1 we feel constrained to hold that since the defendant did not intimate that the goods were ready for delivery before the month of October was over, it is difficult to say that there has been any breach on the part of the plaintiffs.

But Mr. Ramamurthi relies upon certain decisions to show that it is the seller's option that is to decide the time for performance of the contract. Passages at pages 678, 679 and 680 of the decision in *Sivayya* v. *Ranganayakalu*[1], were relied upon. It has to be remembered that their Lordships were dealing with section 93 of Act IX of 1872 which was replaced by section 35 of the Sale of Goods Act. Section 93 of the Contract Act stated as follows :—

> "In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery "

and the words used in section 35 of the Sale of Goods Act are " Apart from any express contract " in the place of " in the absence of any special promise ". But the facts of that particular case show that the observations there are distinguishable as stated by Gentle, J., in the judgment referred to already. The appeal before their Lordships arose out of a suit by the sellers against their buyers for non-acceptance of the goods and the defendants-buyers, resisted the claim on the ground that their sellers were unable to give delivery. Their Lordships observed at pages 681-82 as follows :—

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[1] (1935) 68 M.L.J. 635 : L.R. 62 I.A. 89 : I.L.R. 58 Mad. 670 (P.C.).

> " There is no evidence to show, that if the respondents had applied for delivery and at the same time tendered the contract price, as they were bound to do, the appellants would not have been able to satisfy the demand."

Their Lordships refer to the case in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co.*[1]. But what we have to remember in the present case is that if we construe clause (4) of Exhibit A-1 as an express contract as we have done, then it is the duty of the seller to intimate to the buyer that the goods are ready for delivery and ask him to tender the price and take delivery of the goods.

That, not having been done, we do not think that the observations of the Judicial Committee can be of any help to the respondent. The five contracts which formed the subject-matter of the decision in *Sivayya* v. *Ranganayakalu*[2] do not contain any clause resembling clause (4) of Exhibit A-1.

In discussing the applicability of section 35 of the Sale of Goods Act, Kaushalendra Rao, J., in *Kamuruddin* v. *Anjangon Municipality*[3] observed that :

> " It is not an effective application for delivery on the part of the buyer to merely send notice or letters if goods are to be delivered at the place of the seller. Some person must be sent to whom the goods can be delivered. When the buyer does not make any effective application for delivery up to a certain date the seller is entitled to reasonable charges for care and custody up to that date."

Then again in *Jagannath* v. *Aaron & Co.*[4], at page 285, there are observations to the effect that as delivery of the shares was under the contract to be at the seller's option there must be implied an additional term to the contract that the seller shall give to the buyer sufficient notice of his intention to make delivery and a reasonable time in which to arrange for funds with which to pay for the shares. But that case did not relate to an express contract deviating from the general provisions of section 35 of the Sale of Goods Act. We do not think that the observations in *Kamuruddin* v. *Anjangon Municipality*[3] and *Jagannath* v. *Aaron & Co.*[4] afford any help to the respondent. In our view, therefore, the liability for the non-performance of the contract cannot be laid at the plaintiffs' door as the defendant had not called upon the plaintiffs by notice intimating to them that the goods were ready for delivery as contemplated in the preamble and in clause (4) of Exhibit A-1.

But it is urged by Mr. Ramamurthi that the inference to be drawn from the correspondence is that the defendant could have delivered the goods and that the plaintiffs knew about the fact that the goods were ready for delivery at the mills where yarn was manufactured and that being the case, it is not necessary for the defendant to show that he had physical possession of the goods which could be delivered. A number of cases have been cited to justify this contention. The following observations of McCardie, J., in *Levey & Co.* v. *Goldberg*[5], are relied upon :

> " Mr. Cartwright Sharp suggested that the plaintiffs were not ready and willing to deliver during August. The plaintiffs were not bound actually to tender delivery ; it was sufficient if they were ready and willing to deliver. That principle is amply established by *Jackson* v. *Allaway*[6] and *Baker* v. *Firminger*[7]. The question of readiness and willingness is substantially a question of fact . . . . ."

These observations are not applicable to the facts of the present case because there is nothing to show on the facts that the defendant was ready and willing to deliver the goods before 31st October, 1943.

A line of cases tending to show that in a suit for damages for breach of contract brought by a seller against his buyer for not taking delivery of goods it is not neces-

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1. L.R. (1923) A.C. 48 at 71.
2. (1935) 68 M.L.J. 635 : L.R. 62 I.A. 89 : I.L.R. 58 Mad. 670 (P.C.).
3. A.I.R. 1951 Nag. 148 : I.L.R. (1951) Nag. 40.
4. A.I.R. 1940 Rang. 284.
5. L.R. (1922) 1 K.B. 688 at 692.
6. 6 Man. G. 942.
7. 28 L.J. (Ex.) 130.

sary that the seller should show that he had physical possession of the goods but that it would be sufficient if it is shown that the seller had domain over them and could deliver them as and when the buyer applied for them and tendered their sale price, has been cited before us.

Mulchand Chandolia v. *Kundan Mull and others*[1] was a case where a seller under a contract for sale of ready goods sued the buyer to recover damages for not taking delivery of the goods. The defence was that the seller had not the goods in his possession at the date of the contract and the buyer was not therefore bound to take delivery. It was held that if at the time of entering into the contract and during the period intervening between that date and the due date the seller was in a position at any moment when called upon by his buyer, to deliver the goods he had sufficiently complied with the terms of the contract. That is, it is sufficient if the seller could show that he could give delivery of the goods if called upon to do so.

Ganesh Das Ishar Das v. *Ram Nath*[2] was a converse case where it was held that in a suit by the buyer it is his duty under section 51 of the Contract Act to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods in suit or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money.

Though the observations at pages 150 and 164 were brought to our notice we do not think that there is any guidance to be got from this decision. Similarly in *Lakshmikanthan* v. *Narayanaswami Iyer*[3] which had been noticed in *Ganesh Das Ishar Das* v. *Ram Nath*[2] the learned Judges held that where the performance of a contract is to be simultaneous and a suit is brought for damages for breach of contract each party must show that he was ready to perform his part of the contract. For example in a suit for damages for breach of a contract to sell and purchase, the seller must show that he was able and willing to perform his part of the contract and the buyer must show that he was ready and willing to pay the price. The other case *Satyanarayanamurthi* v. *Erikalappa*[4] related to a set of circumstances where it was held that if the seller can show that he could supply the goods contracted for either from the open market or from any other source he would have performed his part of the obligation. That is, it is not necessary for the seller to show that he had actual domain over the goods. The learned Judges relied upon the decision in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co.*[5], where at page 72, Lord Sumner refers to *Braithwaite's case*[6] and proceeds to say that the seller would have satisfied his part of the contract if it is found that he could have got the goods for delivery to the buyer in the open market. But the learned Law Lord also says that the question is purely one of construction of the words of the contract. Lord Sumner's observations in *British and Beningtons, Ltd.* v. *N. W. Cachar Tea Co.*[5] have been extracted and commented upon in Benjamin on Sale (8th edition) at page 820 and the learned author says that the seller would have satisfied his part of the contract if he had shown on the buyer's repudiation of the contract that he could have had the goods ready for delivery as and when the requisition was made. It seems to us that the principle enunciated in these cases would have no application to the circumstances here for the reason that there is no repudiation by the plaintiffs of their liability to purchase the goods before 31st October, 1943. If the defendant had intimated to the plaintiffs that the goods were ready for delivery either at the seller's godown or at the premises of the Mills then the principle enunciated in these cases would have application. But even if the plaintiffs knew that the defendant could have got the bales of yarn from the Mills as and when it is necessary, that would not be sufficient unless the initiative is taken by the defendant to inform the plaintiffs of his readiness and willingness to deliver the goods and also to ask the plaintiffs to tender the sale price. The correspondence and especially the letters written by the defendant do not show that the plaintiffs were apprised of the fact that the bales were ready for delivery either in the seller's godown or in the Mills. In these circumstances we are of the opinion that it is not shown that the plaintiffs have repudiated the contract before 31st October, 1943.

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[1] (1919) I.L.R. 47 Cal. 458.

[2] (1928) 9 Lah. 148.

[3] A.I.R. 1926 Mad. 1109.

[4] (1925) 50 M.L.J. 150.

[5] L.R. (1923) A.C. 48.

[6] L.R. (1905) 2 K.B. 543.

This fact is made clearer by the plaintiffs' letter, Exhibit A-15, dated 9th November, 1943, wherein the plaintiffs state that all the 65 bales should have been delivered to them on or before 31st October, 1943, as per the terms of the contract and as per rules, resolutions and bye-laws of the Madura Yarn Merchants' Association, Ltd., and that, not having been done, the plaintiffs are not bound to accept delivery of the goods. The plaintiffs charge the defendant with having committed breach of contract by not giving delivery of October *vaida* bales in time. Then a demand is made for the return of Rs. 10,560-8-0 with interest thereon at 4 per cent. per annum up to 31st October, 1943 and at 9 per cent. per annum from 1st November, 1943, up to the date of payment.

It is after this that the defendant sold 29 out of 65 bales by private sale at the plaintiffs' risk on 10th November, 1943 and intimated that fact to the plaintiff by a lawyer's notice, Exhibit A-17, dated 11th November, 1943 and by Exhibit A-23, dated 12th November, 1943, by which details of the entire sale were communicated to the plaintiffs. Exhibit A-23 contains a postscript to the effect that the claim set out in Exhibit A-17 no longer stands out as an independent item of claim since the adjustment of the deposit amount towards the damages payable by the plaintiffs had been made as per terms and intent of the deposit arrangement. The plaintiffs were called upon to pay Rs. 2,747-10-0 after deducting the advance Rs. 10,560-8-0 which is mentioned as a deposit in this letter. As we have already remarked, none of the incidents of a deposit as contemplated in mercantile transactions is present in the advance paid by the plaintiffs to the defendant.

In the alternative Mr. V. C. Gopalaratnam for the plaintiffs contends that even if the contract created an obligation on the part of the plaintiffs to apply for delivery of goods on or before 31st October, 1943 and failure to do so amounted to a breach still the defendant is not entitled to hold back the deposit unless it is shown that after giving notice of resale to the plaintiffs the goods were sold which resulted in a loss to the seller. In fact what has happened is that no notice of resale has actually been given to the plaintiffs but after portions of the goods had been sold the plaintiffs were intimated about it. Sub-section (2) of section 54 of the Sale of Goods Act which corresponds to section 107 of the Contract Act states that where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to resell the unpaid seller may if the buyer does not within a reasonable time pay or tender the price, resell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract but the buyer shall not be entitled to any profit which may occur on the resale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the resale.

From this it is urged that on no account should the goods have been sold by private treaty and that too without previous notice. There is a discussion about the law on the subject in "The Indian Sale of Goods and the Indian Partnership Acts" by Pollock and Mulla, at pages 231 and 232, to the following effect :

> "The question whether a seller of goods has the right of resale is important, for where he has such a right he is entitled to claim as damages the difference between the contract price and the amount realised on the resale, less the costs of the re-sale. while if he has no such right he is entitled to the difference between the contract price and the market price on the date of the breach. Now that power to resell may be either statutory or it may be conferred on the seller by the terms of the contract of sale ; in the former case it can be exercised only if the property in the goods has passed to the buyer, as is implied by the words of this section, in the latter case it can be exercised even if the property in the goods has not passed to the buyer. Thus if it is provided in a contract of 'indent' that on default on the part of the buyer to pay for and take delivery of the goods within a specified time the seller should be at liberty to resell the goods and that the buyer should pay all the loss arising on the contract with interest, the seller is entitled to resell the goods on default on the part of the buyer even if the property in the goods had not passed to the buyer and to sue the buyer for the loss on resale, but it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated for the purpose of the contract."

We have already found that it was the duty of the defendant to give notice of resale and that not having been done the unpaid seller shall not be entitled to recover any damages whatever.

The answer put forward by Mr. Ramamurthi is that in any event it is open to the defendant to appropriate the advance when there is default on the part of the buyer. He contends that the amount of Rs. 10,560-8-0 is in the nature of a deposit and cites passage from Mayne on Damages at page 234 and paragraph 517, at page 378 of Halsbury's Laws of England (2nd edition, Vol. 29) dealing with forfeiture and recovery of deposit. Paragraph 517 states as follows :—

> "The vendor if he becomes entitled to rescind the contract owing to the purchaser's default can both rescind and retain the deposit. The contract being thus at an end, the forfeiture of the deposit is not strictly in the nature of damages for breach of contract though it has been said to be in the nature of liquidated damages and not a penalty. But the purchaser is not entitled to terminate the contract by giving up the deposit. Notwithstanding the deposit the vendor can insist on the contract and sue either for specific performance or for damages beyond the deposit.

Palmer v. *Temple*[1] is sought to be cited. The observations in *Kumaraswami* v. *Karuppuswami*[2] by Venkatarama Aiyar, J., on a similar topic were also brought to our notice. But the principles enunciated in all these authorities would have been applicable only if there had been default on the part of the plaintiffs and also if the advance amount could be treated as adeposit. The nature of a deposit is described in *Howe* v. *Smith*[3] and other cases cited at page 234 of Mayne on Damages. We do not think that the advance paid in this case can be considered as a deposit of that nature.

That the vendor in matters like this can resell the goods and damages sustained by him need not be the difference between the contract price and the market price on the date of sale but can be the difference between the agreed price and what has actually been realised even at a private sale is the contention of the defendant-respondent. To substantiate this a few cases were cited. The Full Bench in *Mool Schutte & Co.* v. *Luchmi Chand*[4] related to a case where the plaintiffs sold the goods under an "indent" contract on an agreed price. On arrival of the goods the defendant refused to pay for and take delivery of the goods on the ground that they were not the goods contracted for. After notice to the defendant the plaintiffs resold the goods and sued to recover the expenses of the re-sale and the difference between the price realised and the contract price with interest. It was held that clause(1) of the indent contract gave the plaintiffs a right to re-sell the goods and sue for damages mentioned therein and that section 107 of the Contract Act had no bearing on the case. The facts of that case are very different from what we have to consider here. The learned Judges of the Calcutta High Court in holding that section 107 of the Contract Act has no application relied upon the terms of the contract and the passage at page 511 in this connection is important :—

> "Section 107 of the Contract Act has, in my judgment no bearing on this case. I base my decision on the terms of the contract between the parties. Here the parties, two mercantile men, perfectly competent to contract, have made their own bargain and one of the terms of that bargain is that if there were any such default on the part of the purchaser as is mentioned in clause (1) (as there was) the vendor was to have the right to resell the goods and any loss or deficiency arising from such resale with interest at the rate of 12 per cent. per annum was to be paid by the purchaser to the vendor. We are told upon the authority of the passage in the case to which I have referred and upon that authority alone, that such a resale is bad and that the course which the vendor (the plaintiff) took in this case was not justified under the contract. I am quite unable to assent to that view."

This case has been followed in *Best* v. *Haji Muhammad Sait*[5] where also the question for consideration related to a clause in the indent and section 107 of the Contract Act could not have been attracted. At page 23, it is observed thus :

> "Since judgment was given the law has been reviewed in the Calcutta High Court(*Mool Schutte & Co* v.*Luchmi Chand*[4]) and the Full Bench has decided that a clause such as that contained in the indent

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[1] (1839) 9 A.D. & El. 508.
[2] (1952) 2 M.L.J. 785 at 796.
[3] (1884) L.R. 27 Ch.D. 89.
[4] (1898) I.L.R. 25 Cal. 505 (F.B.).
[5] (1898) I.L.R. 23 Mad. 18.

before us comes into operation notwithstanding that the property has not passed to the buyers and the same view has been adopted in this Court in a case referred to by the Chief Judge of the Presidency Small Cause Court, (*Ronaldson* v. *Chella Pillai Chetti*[1]). Following this authority we hold that the appellants are entitled to charge the deficiency resulting from the re-sale of the several lots of goods."

The other case on which Mr. Ramamurthi laid stress is *Harichand & Co.* v. *Gosho Kabushiki*[2] which also related to a clause in the contract for the sale of goods, which provided that the seller on the failure of the buyer to take delivery shall be at liberty at any time to re-sell the goods and recover the loss resulting from such resale, gave to the seller a valid right to recover damages on the basis therein mentioned, but if that right is not exercised within a reasonable time, he is thrown back on his remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach. *Best* v. *Haji Muhammad Sait*[3] and other cases were followed. Paragraph 266, at page 199, of the Halsbury's Laws of England, Vol. 29 (2nd edition) dealing with damages fixed by contract can have no relevancy to the facts of the present case.

We are not satisfied that there is anything useful in *Cort* v. *The Ambergate, Etc., Railway Company*[4], which related to a contract for the manufacturing and supply of goods from time to time and as to how damages have to be assessed on the breach of such contract. So also is the discussion at pages 602 and 603 of Williams on "Vendor and Purchaser". Mr. V. C. Gopalaratnam drew our attention to the observations of the learned Judges in *B. Muniswami Chetty & Co.* v. *D. Muniswami Chetti & Co.*[5] to the effect that there is nothing in the Sale of Goods Act which is inconsistent with section 73 of the Contract Act. It does not seem to us that our decision in the case need be based upon these observations.

On the whole, after a review of the evidence and the cases cited at the Bar in relation to the terms contained in Exhibits A-1 to A-5, we are of opinion that the defendant ought to have intimated to the plaintiffs that the goods were ready for delivery before 31st October, 1943 and that not having been done, the plaintiffs cannot be mulcted with any liability for having broken the contract. In these circumstances the defendant is not entitled to any damages and the plaintiffs would be justified in asking for refund of the advance which cannot be considered as a deposit as understood in English Law.

The next argument of Mr. Ramamurthi is that since in Exhibit B-18 the plaintiffs have themselves accepted the liability for damages, as is seen from the entry therein to the effect that the defendant is given credit for Rs.13,308-2-0, and having obtained benefit from the excess profits by acknowledging their liability to that extent and thereby reducing the excess profits for the year, it is not now open to the plaintiffs to say that they are entitled to get back their advance. In In re. *Tarun Kumar Ghose*[6], Remfry, J., took the view that when a man acted in a particular way he cannot be heard to say for his benefit that he acted wrongfully. The facts of the case show that a person deposited a sum of money in the Post Office Savings Bank account in the name of his minor son and thereby escaped liability of paying income-tax and on the death of the minor he applied for letters of administration claiming that the money was invested in the minor's name with a view to escape the liability of paying income-tax and that therefore he should not be compelled to pay duty in respect of that sum, the learned Judge held that such a plea cannot be countenanced. Mr. Ramamurthi relies upon the principle enunciated in this decision which has the support of a large body of case-lawin England such as In re. *Hallett's Estate*[7]. But we do not know whether as a matter of fact the plaintiffs have obtained any advantage by this entry or that the plaintiffs had to pay less of excess profits tax.

Mr. V. C. Gopalaratnam contends that if the plaintiffs got back the advance paid, that would be income for the year during which the same was realised in

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1. Referred Case No. 29 of 1897.
2. (1924) I.L.R. 49 Bom. 25.
3. (1898) I.L.R. 23 Mad. 18.
4. (1851) 17 Q.B. 125 : 117 E.R. 1229 at 1237.
5. (1944) 1 M.L.J. 391 at 392, 393.
6. A.I.R. 1935 Cal. 509.
7. (1879) L.R. 13 Ch. D. 696.

which event income-tax would have to be paid on that. If that is so, there is no question of any advantage accruing to the plaintiffs. The plaintiffs' case is that the entry was made "without prejudice" and what is spoken to by P.W. 1 is as follows :—

> "I told the clerk to write the entry with the expression 'without prejudice'. The entry in the ledger, Exhibit B-18 'is by another clerk, Sesha Iyer. I did not instruct him not to write 'without prejudice' ".

In the absence of any evidence that the plaintiffs have actually obtained any benefit we do not think that this contention of the defendant can prevail.

The last point for consideration is, what relief the plaintiffs are entitled to. It seems to us that the claim for interest made by the plaintiffs is unsustainable for the reason that by their conduct the defendant rightly or wrongly believed to some extent that the goods would be taken delivery of after 31st October, 1943, though the plaintiffs had not, by anything in writing or in express words indicated that. On that account, we do not allow them any interest on the advance paid by them. In the result Appeal No. 127 of 1952 is allowed and the plaintiffs will be given a decree for Rs. 10,560-8-0 with interest at six per cent. per annum thereon from the date of the plaint. Each party will bear their costs in the lower Court and here. The result of allowing Appeal No. 127 of 1952 means the automatic dismissal of Appeal No. 933 of 1952 which is accordingly dismissed without costs.

Appeal No. 127 *of* 1952 *allowed.* *Appeal No.* 933 *of* 1952 *dismissed.*

V.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

R. A. Natarajan .. *Appellant**

v.

Regional Transport Officer, Chingleput .. *Respondent.*

Motor Vehicles Act (IV of 1939)—*Suspension of permit for breach of conditions of permit—Expiry of the period covered by the permit—Suspension order if could be enforced against the renewed permit.*

In cases of route permits issued under the Motor Vehicles Act there is an integral connection between the original permit and the permit granted in renewal of it. It may be that in certain respects a renewed permit may resemble a fresh permit. But after renewal it is the original permit that continues in force, under the scheme of the Act and Rules, for a further period for which it is renewed after the expiry of the period for which it was originally granted. Hence the penalty for a breach of any of the conditions of the original permit committed during period of the original permit, can be enforced during the further period for which the permit continues to be in force after renewal.

Anjaiah v. *Regional Transport Officer,* (1956) An. W.R. 344 and W.A. 42 of 1956, differed.

Muthuvadivelu v. *R. T. Officer,* A.I.R. 1956 Mad. 143, referred.

Appeal against the Order of Mr. Justice Rajagopala Ayyangar, dated 6th April, 1954 and passed in Writ Petition 243 of 1954 presented to the High Court to issue a Writ of Prohibition restraining the Respondent therein from enforcing the order in proceedings No. 6258/B1/52, dated 17th March, 1954, on the file of the Regional Transport Officer, Chingleput.

R. M. Seshadri, N. G. Krishna Ayyangar, B. Punyakoti Chetty and *P. Babulu Reddy,* for Appellants.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*), for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—A common question arises in these two appeals which were heard together. They are from the Judgments of Rajagopala Ayyangar, J., in two Writ Petitions Nos. 243 of 1954 and 615 of 1953 respectively. As the main judgment of the learned Judge was given in Writ Petition No. 615 of 1953, we shall deal with Writ Appeal No. 75 of 1954 first.

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* Writ Appeals Nos. 45 and 75 of 1954. 30th November, 1956.

The material facts in Writ Appeal No. 75 of 1954 are as follows : The appellant is a bus operator in Chingleput District. One of his buses, M.D.H. No. 1174 was allowed to run on the route Kancheepuram to Maduranthakam under a stage carriage permit granted to him and which was due to expire on 31st January, 1953. The Regional Transport Officer, Vellore, who was then the Secretary of the Regional Transport Authority, Chingleput, in his Memorandum, dated 26th August, 1952, framed a charge against the appellant that on 4th February, 1952, the bus was over loaded. The appellant submitted an explanation but the Regional Transport Officer found the appellant guilty of the charge and by his order, dated 2nd November, 1952, suspended the permit for a period of four months. The appellant filed an appeal to the Central Road Traffic Board, Madras, against this order of suspension. But that appeal was dismissed. He then filed a revision petition to the Government under section 64-A of the Motor Vehicles Act. The Government, by their order, dated 15th May, 1953, reduced the period of suspension from four months to two months ; but otherwise dismissed the revision petition. In August, 1953, the appellant filed a petition in this Court under Article 226 of the Constitution praying that this Court may be pleased to issue a writ of *certiorari*, or any other appropriate writ, or order, quashing the orders of the Regional Transport Officer, Chingleput, the Central Road Traffic Board, Madras, and the State of Madras, above referred to.

In the meantime, on the expiry of the period for which the permit was originally granted, *i.e.* on 31st January, 1953, in pursuance of an application by the appellant, the Regional Transport Officer granted a renewal of the permit from 1st February, 1953 to 31st January, 1954.

The main ground, and the only ground, with which we have to deal in this appeal, and on which the appellant based his writ petition, is that as the period for which the original permit was granted had expired on 31st January, 1953, the order of the Government suspending the permit for two months could not have any application to the renewed permit which was in force from 1st February, 1953. The contention was that the renewal permit, which was in force on the date of the order of the Government, could not be suspended for any violation of a condition contained in an expired permit. This point was taken even in the revision petition filed before the Government. The Government, however, overruled this objection thus :

> "The Government are advised that a permit which has been renewed is not a new permit and hence when the permit continues to be effective on its renewal, the rights and obligations of the permit holder are also continued without interruption ".

In the counter-affidavit filed on behalf of the Government, in the Writ Petition, the same plea has been urged, *viz.* that " when renewed the life of the permit is only extended and no new permit is granted."

Rajagopala Ayyangar, J., overruled the contention of the appellant. He held that there was sufficient connection between an original permit and a permit obtained on its renewal to enable the transport authorities to cancel, or suspend, the latter for breach of the conditions committed during the currency of the original permit. He also held that on the merits, the order of the transport authorities was right and dismissed the Writ Petition.

It was again contended before us by Mr. R. M. Seshadri, learned counsel for the appellant, that a renewed permit must be deemed to be a new permit and it could not be suspended for a breach of a condition contained in the original permit and committed during the currency of such permit. In support of his contention he relied on the ruling of the Andhra High Court in *Anjaiah* v. *Regional Transport Officer, Guntur*[1]. The decision certainly helps the appellant. The learned

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[1] (1956) An. W.R. 344.

Judges there held that the suspension order passed for breach of one of the conditions of the old permit could not be enforced against a new permit. The reasoning of Bhimasankaram, J., who delivered the judgment of the Court may be thus stated in his own words :

> "An applicant for renewal of a stage carriage permit along a particular route will generally have to survive competition along with other applicants when he applies for renewal and all that he can claim is a perference over others if other conditions are equal. Where, therefore, a permit is granted to him once more, it cannot, in our opinion, be treated as the old permit extended for a fresh period ....In a case therefore like the present one, we are of the opinion that what is granted is in essence a new permit and that is not a mere continuance of the old one. A renewal, therefore, in this case would only mean a permit which is granted for fresh period or which replaces the old one by a new one. We hold accordingly, that the suspension order passed for breach of one of the conditions of the old permit cannot be enforced against the permit now in force."

The learned Judge apparently was prepared to make a distinction between renewal of a permit of a private carrier, a motor-cab, and renewal of a stage carriage permit. He says :

> "While in the case of a renewal of a permit of a motor-cab it may not be inappropriate to describe the new permit as an old permit with an extended period, the same cannot be said of a stage-carriage permit granted to the holder of a previous permit".

Mr. Seshadri drew our attention to an observation in a judgment of this Bench of Writ Appeal No. 42 of 1956 which certainly does appear to approve of the decision in *Anjaiah* v. *Regional Transport Officer, Guntur*[1]. That observation is to the following effect :

> "We may refer in passing to the ruling of the Andhra High Court which apparently was brought to the notice of Rajagopala Ayyangar, J., *Anjaiah* v. *Regional Transport Officer, Guntur*[1]. The actual decision in that case was that a suspension order passed for breach of one of the conditions of the 'old permit could not be enforced against a renewed permit. We may mention that this Court has also taken the same view".

Obviously the above observation was made *obiter* because the question which falls for decision in this case and which was dealt with by the Andhra High Court did not arise in that case, *i.e.*, Writ Appeal No. 42 of 1956. It was not necessary to examine the soundness of the view taken by the Andhra High Court for the purpose of the case then before us. We have, therefore, heard arguments unhampered by the above *obiter dictum*. We may also mention that our attention was not drawn to any decision of this Court reported, or unreported, in which the decision of the Andhra High Court in *Anjaiah's case*[1] has been approved. We are free to confess that the statement in that judgment that this Court has also taken the same view must have been based on personal recollection which probably is not accurate.

That there is an intimate and integral connection between an original permit and a permit granted in renewal of it, has been laid down by this Court in two decisions. The first is in *K. Muthuvadivelu* v. *Regional Transport Officer*[2]. It was held in that case that though, for certain purposes, a renewed permit may be treated as a fresh permit, the validity of a renewed permit depends on the validity of the original permit. If, for any reason, subsequent to the grant of the original permit, it is eventually decided by a competent tribunal that it was wrongly granted, the result would be as if no permit had ever been granted at all and even if, meanwhile, there had been a renewal of the permit, such renewal would cease to have any effect after the original permit had been set aside. The decision was followed in Writ Appeal No. 42 of 1956.

The answer to the question as to what exactly happens in law when a permit is renewed is furnished by section 58 (1) of the Motor Vehicles Act, which runs thus :

> "A permit other than a temporary permit issued under section 62 shall be effective without renewal for such period as the Regional Transport Authority may in its discretion specify in the permit".

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[1] (1956) An. W.R. 344.

[2] A.I.R. 1956 Mad. 143.

Ordinarily a permit will be effective for such period as the Regional Transport Authority specifies in the permit. This would be so if it is not renewed. But if it is renewed, it will be effective for such period as the authority may specify in the order of renewal. This result follows from the words "without renewal" found in section 58 (1) of the Act. Developing the idea contained in section 58 (1), we may say that a permit "without renewal" shall be effective for the period specified in the original permit and shall be effective "with renewal" for such period up to which the renewal is made. This, in our opinion, makes it amply clear that in the contemplation of the Act, it is the original permit itself which is renewed, the consequences of the renewal being to extend the period during which a permit would be in force. That this was the intention of the Legislature is also clear from a perusal of the relevant Rules and Forms made and prescribed under the Act. Rule 184 (1) says that the Transport Authority sanctioning an application for renewal of a permit shall call upon the permit holder to produce the registration certificate or certificates of the vehicle or vehicles and Part B or Parts A and B of the permit as the case may be and endorse the renewal in Parts A and B of the permit and return them to the holder. This leaves us in no doubt whatever that no fresh permit is issued. It is the same old permit that is produced before the Transport Authority and after endorsement of renewal is returned to the holder. Rule 185 runs as follows :

> "If an application for the renewal of a permit has been made in accordance with these rules and the prescribed fee paid by the prescribed date, the permit shall continue to be effective until orders are passed on the application or until the expiry of four months from the date of receipt of the application whichever is earlier. If orders on the application are not passed within four months from the date of receipt of the application the permit holder shall be entitled to have the permit renewed by the Transport Authority for the period specified in the application or for one year whichever is less........"

Here again it is the same old permit which continues to be effective until orders are passed on the application for renewal and if orders are not passed within four months it is the same permit which is renewed for a further period.

Form P.S.P. relates to the permit in respect of a particular stage carriage. When a renewal is granted, the following endorsement is made on the permit;

> "This permit is hereby renewed up to the day of 19 , subject to the following further conditions" :

Vide also the language of the endorsement on Form P.S.S. So it is "this permit" that is renewed by the Transport Authority. Incidentally we may draw attention to the fact that the renewal can be "subject to the following further conditions". This shows that in granting a renewal, the Transport Authority may impose further conditions. This is what Rajagopala Ayyangar, J., held in Writ Petition No. 823 of 1952 and undoubtedly he was right. But as the learned Judge has observed in the Judgment under appeal, we do not consider that the decision in Writ Petition No. 823 of 1952 affords any countenance to the broad proposition now stated that a renewal permit has no connection whatsoever with the original permit, and that for breach of the conditions of the original permit, action could not be taken merely because a renewal has not been effected". In Writ Appeal No. 42 of 1956 we said, after referring to the endorsement which is made on renewal :—

> "Therefore, it would be correct to say that in one sense the renewal is of the old permit, though for certain purposes the procedure to be followed for granting the renewal and the right of the authorities to impose new conditions may be as in the case of a new permit".

We shall now examine the reasoning of Bhimasankaram, J., in *Anjaiah's case*[1]. After referring to the decision of this Bench in *K. Muthuvadivelu* v. *Regional Transport*

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[1] (1956) A.W.R. 344.

Officer[1] and the decision of Rajagopala Ayyangar, J., in Writ Petition No. 823 of 1952, the learned Judge says :—

> "The question before us now is whether this case has to be decided with reference to the rule enunciated by Rajagopala Ayyangar, J., or with reference to the other rule (evidently the rule laid down in *K Muthuvadivelu* v *R. T. Officer*[1])."

We fail to see the antithesis. In our Judgment in Writ Appeal No. 42 of 1956 as well as in the Judgment in *K. Muthuvadivelu* v. *Regional Transport Officer*[1] we made it clear that we did not disagree with the decision of Rajagopala Ayyangar, J., in Writ Petition No. 823 of 1952. That decision is not in any way inconsistent with the decision in *K. Muthuvadivelu v. Regional Transport Officer*[1]. In certain respects, the renewed permit may resemble a fresh permit, *e.g.*, in the procedure which has to be followed before a renewal is made and the right of the Transport Authorities to impose new conditions. But the question is whether, after renewal, the original permit does not continue in force for a further period. In our opinion, it certainly does according to the provisions of the Act, the Rules and the Forms prescribed. No convincing reasons have been given in *Anjaiah's case*[2] for the contrary conclusion reached therein. Bhimasankaram, J., in *Anjaiah's case*[2] referred to the definition of " permit " as including a permit relating not only to a stage-carriage but also to other kinds of transport vehicles, such as a motor-cab and a private carrier, and says that permits, other than stage-carriage permits, are almost automatically renewed, such as one in the case of a motor-cab, or one authorising an owner to use a vehicle as a private carrier. The learned Judge is evidently of opinion that in these cases there is no question of competition. We do not share that assumption. There may be circumstances in which the Transport Authorities may think it desirable to restrict the number of motor-cabs or private carriers. Then there would be competition, of course, the person having already a permit being entitled to a preference. What is interesting to note, however, is that the learned Judge is apparently of the view that in the case of a renewal of a permit of a motor-cab, it may not be inappropriate to describe the new permit as an old permit with an extended period ; but he considered that the same cannot be said of a stage carriage permit granted to the holder of a previous permit. We fail to see why. If the learned Judge's conclusion is based on the fact that in the case of a motor-cab there is an almost " automatic renewal " then we may point out to Rule 185 under which, in certain circumstances, there may be an " automatic renewal " (not an almost automatic renewal) of a stage carriage permit also. In such a case, that is, when there is an automatic renewal of a stage-carriage permit, following the reasoning of the learned Judge it would not be inappropriate to describe the new permit as an old permit with an extended period. We may also point out in this connection to the language of the endorsement of renewal on Form P.C. which relates to a permit in respect of a particular contract carriage, and to Form P.P.C. which relates to a private carrier's permit. The language is identical with the language used for endorsement of renewal on a stage carriage permit. With great respect to the learned Judge, we think that the distinction sought to be made by him between renewal of a permit of a motor-cab or private carrier and renewal of a permit for a stage carriage is not warranted. With due deference to the learned Judges we find ourselves unable to accept their decision in *Anjaiah's case*[2]. We hold that it is the same permit which continues to be in force for a further period when it is renewed after the expiry of the period for which it was originally granted. It follows that for a breach of any of the conditions committed during the period of the original permit, a penalty can be enforced during the further period for which the permit continues to be in force after renewal. We are, therefore, in agreement with the Judgment of Rajagopala Ayyangar, J. The appeal is dismissed. There will, however, be no order as to costs.

The same point arises in Writ Appeal No. 45 of 1954. Following our above decision, we dismiss this appeal also. There will be no order as to costs.

R.M. —— *Appeals dismissed.*

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1. A.I.R. 1956 Mad. 143.
2. (1956) An. W.R. 344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAMASWAMI.

Palwanna Nadar and others .. *Appellants**

v.

Annamalai Ammal .. *Respondent.*

Hindu Law—Joint family—Father—Powers of gift—Gift of immovable property to daughter—Conditions of validity—Settlement of property on daughter before obligation to make marriage provision arises—Validity.

Though a father in an undivided Hindu Mitakshara family has full powers of dispostion over his self-acquired properties, he has no such power in respect of joint family properties ; but he can make within reasonable limits, by custom in the Madras Presidency, gifts of immoveable property of the joint family to his daughter on the occasion of her marriage and when she is departing from her parental home. This customary obligation may be fulfilled later, if not fulfilled at the time of marriage, without point of time, not only by the father but also by his widow or son taking over the estate from the father. These limits cannot be exceeded, and the father has no power to make a gift of immoveable property to his daughter by purporting to make a settlement for the fulfilment of an obligation which has not arisen and which obligation might not at all arise to be fulfilled.

Annamalai Ammal v. *Sundarathammal*, (1952) 2 M.L.J. 782, reversed.

Mayne on Hindu Law and Usage, 11th edition, section 370, page 472, cited.

Case-law reviewed.

Appeal under clause 15 of the Letters Patent against the decree and judgment of Mr. Justice Chandra Reddy, dated 14th November, 1951[1] and passed in S.A. No. 835 of 1948 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tirunelveli in A.S. No. 89 of 1947 (O.S. No. 1 of 1946, District Munsiff's Court, Tenkasi).

M. Natesan and *V. Meenakshisundaram*, for Appellants.

K. Veeraswami, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is directed against the decree and judgment of Chandra Reddi, J. In S.A. No. 835 of 1948 (reported as *Annamalai Ammal* v. *Sundarathammal*[1]) reversing the decree and judgment of the learned Subordinate Judge, Tirunelveli, in A.S. No. 89 of 1947, affirming the dismissal of O.S. No. 1 of 1946 on the file of the District Munsiff's Court, Tenkasi.

The suit properties, namely, three and odd acres of dry land and a house, belonged to the joint family of Mahalinga Nadar and his sons. This Mahalinga Nadar had married twice, namely, the first defendant's sister as his first wife and the first defendant as his second wife. On account of disputes between the wives the first defendant was living separately. The first defendant had borne to Mahalinga Nadar the present plaintiff.

On 3rd February, 1921, when the plaintiff was six years old Mahalinga Nadar executed a settlement-deed, Exhibit P-1, the relevant portion of which runs as follows :

> "You are my second wife. You have up till now a female child by name Annamalai Ammal aged six years. As according to my promise given at the time of your marriage in the presence of mediators that I should give you immoveable properties. I have by this deed given you the properties shown in the schedule hereto valued at Rs. 600 and now itself placed you in possession of the same. From this day onwards, you may enter into possession of the property and enjoy the same for your life-time without making any alienation. After your life-time the aforesaid property will go to your daughter the aforesaid Annamalai Ammal and she shall take it with absolute right to deal with the said property. It is assured that there are no other encumbrances over the schedule properties."

The items conveyed in the settlement deed are portion of S. No. 696 and a portion of S. No. 693 and a house in Kuthukkavalasi and 16 cents in S. No. 28. On

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* L.P.A. No. 365 of 1952. 27th September, 1956.

[1] (1952) 2 M.L.J. 782.

13th June, 1924, Mahalinga Nadar brought about a partition deed, Exhibit D-14 in which he mentioned that he had got two sons, defendants 3 and 4 and also Ganapathi by his second wife, the first defendant. Under this document he says that he and his second wife the first defendant and her son Ganapathi should take the first schedule property. The second schedule of properties is given to Sankaralinga and the third schedule of properties was to be taken by Palvanna Nadar, the fourth defendant and the fourth schedule of properties by his mother Avadaiammal. In this partitition the 4th item, the tope and the house the 3rd item settled upon his second wife are not included. But the other two items are dealt with.

The contention raised by the defendants was that Exhibit P-1 was not acted upon by Mahalinga Nadar himself but as pointed out by the Courts below, Mahalinga Nadar having settled the properties upon his second wife he could not go back upon it; but this point would have been of material importance if subsequently the first defendant had not released all her rights in favour of defendants 3 and 4 under Exhibit D-3, dated 15th November, 1929 and the only point now to be considered is whether the remainder given to the daughter of a portion of the joint family property as gift is valid as per Hindu Law, notwithstanding the fact that the gift has been held to be of a reasonable portion of the coparcenary property consisting of four houses, four vacant sites and 30 acres of land.

It is in these circumstances that the plaintiff has filed the suit for a declaration that the release deed referred to above has been brought about fraudulently and cannot affect her rights and that the alienations which have been sought to be made of these properties by the second defendant, wife of Mahalinga and her step-brothers, Sankaralinga (D-3) and Palvanna Nadar (D.4) and the wife of the third defendant, Punnavanathammal would not be binding on her. The principal contention of the defendants was that the settlement of a portion of the joint family properties by Mahalinga Nadar in favour of the first defendant is not valid and binding on the joint family.

Both the Courts below upheld the contention of the defendants and dismissed the suit.

In appeal Chandra Reddi, J., came to the conclusion that it was competent for an undivided Hindu father governed by the Mitakshara system of law to make a valid gift of a reasonable portion of joint family property as a future marriage portion of a daughter. On this finding he allowed the second appeal.

This reversal of the decree and judgment of the lower Courts is attacked before us on two grounds, namely, that the document by itself does not purport to be a future marriage provision for the plaintiff and, secondly, even if it is assumed that the father has made such a future provision, it is not permissible under the Mitakshara Law and is beyond the powers of an undivided Hindu father governed by the Mitakshara system in regard to joint family properties.

From the contents of the settlement deed which have been reproduced it is impossible to deduce that the remainder given to the daughter was by way of a future provision for her marriage. The plaintiff was then only six years old and the father could not legitimately have thought of making a provision for her marriage when his second wife was only 25 years of age and Mahalinga Nadar himself died 18 years before the filing of the suit. In fact, if Mahalinga Nadar had wanted to make such a future provision for his daughter, he could have said so in the settlement deed. The document shows that the settler has only chosen not to give an absolute estate to his wife and has given the remainder to the daughter born to her. We need not point out that a document purporting to settle even a portion of joint family properties on a second wife by way of gift as marriage portion is not valid . The special powers of a father do not extend beyond purposes warranted by special texts. It is settled law that a father has special powers over the moveable properties for indispensable acts of duty and over immoveable properties for pious purposes, Since indispensable acts of duty mean and include pious purposes, a father has no larger power over moveable properties than over immovable properties except in the matter of gifts through affection, inspite of the difference in the terminology used by the texts. (*See* Mayne, Tenth Edition page 464 *Baba* v. *Timma*[1].) A gift to a daughter or any other relation is not for pious purposes ; and though a gift through affection may be made of moveable property a gift of immovable property cannot be supported as one made through affection. But it has been held by this Court that a father can make a gift of a small portion of his immovable property to his daughter *at or after* marriage, such gift being *customary* in this presidency. Therefore, looked at as a gift of immovable property in favour of the second wife and as a marriage portion for her daughter the settlement is invalid.

Turning to the settlement of the properties being construed as a gift of the joint family properties as a marriage portion, decided cases go to the extent of such provision being made either at the time of the marriage or subsequent to the marriage on the principle that the moral obligation of the father to make such a provision continues till it is discharged by fulfilment and that this can be fulfilled not only by the father at any point of time subsequent to the marriage, but also by his widow or son who takes over the estate from him and who is affected with this moral obligation. These propositions are concluded by authority and a compendious summary of the same is made in Mayne on Hindu Law and Usage (11th Edn.) in section 370 at page 472 as follows :—

> " Gifts to brides on occasions of marriage are very common and various Hindu Texts impose a moral obligation on the father or other relatives to make them. (Manu IX, 194, Narada XIII, 8 ; Yajn. II, 143, 144 ; Vishnu XVII, 18. Mit. II, XI, 4, 5)."

These gifts usually take the form of jewels or other moveable property. It has been held that a gift, by a father to his daughter or to her husband for the benefit of both on the occasion of her marriage of a small portion of ancestral immovable property is valid. (*Ramaswami Ayyar* v. *Vengidaswami Ayyar*[2] ; *Kudutamma* v. *Narasimha*[3]; *A. Sundararamayya* v. *Seethamma*[4] for the judgment of Krishnaswamy Ayyar, J. in that case *see* page 701 ; *Subba Naicker*, In re,[5] *Sitamahalakshmamma* v. *Kotayya*[6] (see also *Ramalinga* v. *Narayana*[7], *Ramakrishna* v. *Parameswara*[8] *Palaniammal* v. *Kothandarama Gounder*[9]. But this power cannot be exercised by a mother acting as guardian of her infant son who alone constituted the family and who is the owner of the properties at the time ; *Palaniammal* v. *Kothandarama Gounder*[9]. As Subramania Ayyar, J., says, a gift of small extent of land 'bhudanam)' on such an occasion is a customary indispensable duty where the family can afford it. *Ramaswami Ayyar* v. *Vengidaswami Ayyar*[2], *Vettor Ammal* v. *Poochi Ammal*[10]. Even after marriage a gift can be made to a daughter by way of marriage portion either by her father or after him by her brother *Vettor Ammal* v. *Poochi Ammal*[10]. (But such a gift of an unreasonable portion of the joint family property would be invalid ; *Kamakshi Ammal* v. *Chakrapani Chettiar*[11]. In *Churaman Sahu* v. *Gopi Sahu*[12] the Calcutta High Court held that it would be competent to a managing member as it is to a widow, to make a valid gift of a reasonable portion of immoveable property of the family to a daughter born in the family on the occasion of her *Gowna* ceremony. The Bombay High Court has held that a father cannot make a gift even of a small portion of joint family immoveable property to his daughter though she was looking after him in his old age (*Jinnappa Mahadevappa* v. *Chimmava*[13]). This would be right if it merely rested on the view that a gift of affection (prasadadana) which is mentioned in the Mitakshara I, i. 27 could only be made of ancestral moveable property and not of ancestral immoveable property. But where the gift is in discharge of the moral obligation to provide a marriage portion as in the Madras cases, it would come under the Mitakshara I, i. 29, as gift in discharge of an indispensable duty. In *Ramalinga Annavi* v. *Narayana*[1], the Judicial Committee evidently regarded the gift of small share of immoveable property to a daughter as within the authority of a karta.

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[1] (1883) I.L.R. 7 Mad. 357 (F.B.).
[2] (1898) 8 M.L.J. 170 : I.L.R. 22 Mad. 113.
[3] (1907) 17 M.L.J. 528.
[4] (1911) 21 M.L.J. 695 : I.L.R. 35 Mad. 628.
[5] (1915) 2 M.L.W. 754.
[6] (1936) 71 M.L.J. 259.
[7] (1922) 43 M.L.J. 428: L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).
[8] (1931) M.W.N. 215.
[9] (1943) 2 M.L.J. 432 : I.L.R. (1944) Mad. 418.
[10] (1911) 22 M.L.J. 321.
[11] (1907) 17 M.L.J. 405 : I.L.R. 30 Mad. 452.
[12] (1910) I.L.R. 37 Cal. 1.
[13] (1935) I.L.R. 59 Bom. 459.

To sum up, though a father of an undivided Mitakshara joint family has full power of disposition over his self-acquired properties, he has no such power in respect of the joint family properties ; but he can make within reasonable limits by custom in this presidency gifts of immoveable properties of the joint family to his daughter on the occasion of her marriage and when she is departing from her parental home ; and this customary obligation can be fulfilled later if not fulfilled at the time of the marriage without point of time not only by the father but also by his widow or son taking over the estate from the father. These limits cannot be exceeded by purporting to make settlements for the fulfilment of an obligation which had not arisen and which obligation might not even arise to be fulfilled since the daughter may die unmarried or remain a spinster as it is probable that while a vast majority of women prefer a married life some of them either by choice or by necessity may lead a life of celibacy. In fact as pointed out in the " Evolution of Hindu Moral Ideals" by Sir P. S. Sivaswami Ayyar (Kamala Lectures) such spinsters have always existed in our society and those old spinsters were called Amajur (अमाजुर्) or pithrushad (पितृषद्). We are unable to agree with the first impressions of Chandra Reddi, J. and we, therefore, set aside his decree and judgment and restore the decree and judgments of the Courts below but in the circumstances without costs, throughout.

P.R.N. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Rayala Corporation (Madras) .. *Petitioner**

v.

Syed Bawker & Co., Mount Road, Madras and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), sections 4 and 12-E and Rule 24 of the Rules—Power of controllers to issue subpoena to witnesses other than public servants—Fixation of fair rent—Criterion.

Though generally the Controllers appointed under the Madras Buildings (Lease and Rent Control) Act are persons belonging to the Judicial service, they are not Courts and the proceedings before them will not be governed by the provisions of the Code of Civil Procedure. But having regard to the several provisions of the Act relating to service of summons and hearing of parties, etc., the controllers under the Act or the Appellate Authority have the power to summon witnesses, other than public servants. The summons referred to in rule 24 (2) cannot be restricted to summons to the respondents in an application and to public servants. The rule contemplates the issue of summons to private witnesses at the instance of parties. The expression 'require the attendance' in sub-rule (7) of Rule 24 is wide enough to include requiring attendance by summoning. This is also in accordance with justice.

For purposes of fixation of fair rent under the Act it is no doubt true that there is no provision in the Act which specifically provides for taking into consideration the prevailing rates of rents of buildings in the locality which had been constructed subsequent to 1st April, 1940. But section 4 refers to 'the circumstances of the case' and the prevailing rates of rent of similar buildings at the time of the application will be a circumstance which can be taken into account especially when there is no reliable evidence as to the 1939-40 rental.

Petitions under section 12-B, of the Madras Buildings Lease and Rent Control Act XXV of 1949 as amended by Act VIII of 1951 praying the High Court to revise the order of the Court of the Small Causes, Madras, dated 5th December, 1955 and made respectively in H. R. A. Nos. 85,98,97,99 and 100 of 1955 (H. R. C. Nos. 3932, 3934, 3933, 3935 and 3936 of 1954 respectively on the file of the House Rent Controller, Madras)

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[1] (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).

* C.R.P. Nos. 270 to 274 of 1956. 12th February, 1957.

V. C. Gopalaratnam and *L. V. Krishnaswami Ayyar* for Petitioner.

V. Tyagarajan and *M. A. Ghatala* for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C. J.—The only question which demands consideration from us in this batch of Civil Revision Petitions is whether the Rent Controller has not the power to summon witnesses other than public servants by the issue of subpoenas. These petitions came originally before Govinda Menon, J., who made the following order :

> " Post before a Bench whether the Rent Controller has any power inherent or otherwise to summon witnesses."

Counsel in this case have not been able to draw our attention to any decided case, reported or unreported, dealing with this question. We are therefore left with the relevant provisions of the Act and the rules framed under the Act.

The applications in question are under section 4 of the Madras Buildings (Lease and Rent Control) Act, 1949, for fixation of fair rent. But the same question would arise even as regards applications under other sections of the Act. It is obvious that though generally Controllers have been persons belonging to the judicial service they are not Courts and therefore the proceedings before them will not be governed by the provisions of the Code of Civil Procedure. Section 17 of the Act confers powers on the State Government to make rules to carry out the purposes of the Act, and, without prejudice to the generality of this power, the rules may provide *inter alia* for

> (*b*) the procedure to be followed by Controllers and appellate authorities in the performance of their functions under this Act.
>
> (*c*) the manner in which notices and orders under this Act shall be given or served.

Section 17 (4) declares that

> "all rules made under this section shall be published in the *Fort St. George Gazette* and upon such publication shall have effect as if enacted in this Act".

Now we turn to the Madras Buildings (Lease and Rent Control) Rules, 1951, which are applicable to these cases. Rule 8 prescribes the particulars which should be contained in every application under the Act. Rule 9(1) provides for issue of notice to the respondent or respondents mentioned in the application. Rule 9 (2) says that the Controller shall give to the parties a reasonable opportunity to state their case and he shall record a brief note of the evidence of the parties and witnesses, if, any, examined on either side and upon the evidence so recorded and after consideration of any documentary evidence which may be produced by the parties pass orders on the application. Rule 15 confers powers on the Controller and the appellate authority in cases falling under section 5 of the Act or in any other case under the Act, if he thinks fit to do so, to personally inspect the building concerned. Rule 22 specifically provides for the service of summons issued under section 12-E. That section empowers the Controller in his discretion to issue summons to public servants requiring them to attend in person to give evidence or to produce documents in their custody in connection with any proceedings before him. Rule 24 is in our opinion most material for the consideration of the question before us. The following sub-rules of Rule 24 are relevant :—

> (1) Every summons issued under the Act shall be in writing, shall be authenticated by the seal, if any, of the officer by whom it is issued, and shall be signed by such officer or by any person authorised by him in writing in that behalf.
>
> (2) It shall require the person summoned to appear before the said officer at a stated time and place and shall specify whether his attendance is required for the purpose of giving evidence, or to produce a document or for both purposes ; and any particular document the production of which is required shall be described in the summons with reasonable accuracy.

(3) Any person may be summoned to produce a document without being summoned to give evidence ; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced, instead of attending personally to produce the same.

Sub-rule (4) provides for several ways of service of summons on any person. While Rule 22 limits these ways to personal delivery or tendering personally or sending by registered post, Rule 22 (4) enumerates all the ways we are familiar with under the provisions of the Civil Procedure Code, *e.g.*, by a notice being left at the last known place of abode or business or by giving or tendering it to some adult member of his family and by affixture. Rule 24 (7) runs thus :

> " The Controller or the appellate authority, as the case may be, shall have power to administer oaths, to require the attendance of all parties concerned and of witnesses and require the production of all books and documents relating to the matter of the dispute."

We are reasonably convinced that the summons referred to in Rule 24 cannot be restricted to summons to the respondents in an application and to public servants under section 12-E. Rule 24 (2) in our opinion contemplates the issue of summons to private witnesses at the instance of parties, and sub-rule (2) authorises the Controller or the appellate authority to require the attendance of witnesses and the production of documents. If specific authority is necessary to support the view we are taking, namely, that the Controller or the Appellate Authority has the power to summon witnesses, such authority can be found in sub-rule (7). The expression ' require the attendance ' is wide enough to include requiring by summoning. There can be no doubt that the view we have now taken is in the interests of justice and will enable the parties to place before the Controller all material evidence.

Before the Appellate Authority the point was specifically urged that the Rent Controller should have summoned witnesses and a substantive application was also filed before him for the summoning of those witnesses. But the Appellate Authority thought that no useful purpose would be served by recording such evidence regarding buildings constructed subsequent to 1940. We cannot agree with this statement. No doubt there is no provision in the Act which specifically provides for taking into consideration the prevailing rents of building in the locality which had been constructed subsequent to 1st April, 1940. But section 4 does refer to the circumstances of the case in sub-clause (2) (*c*). It cannot be denied that the prevailing rent of similar buildings at the time of the application will be one of the circumstances which can be taken into account, especially as in this case the Rent Controller found that there was no reliable evidence as to the prevailing rate in the locality for similar accommodation in similar circumstances during the twelve months prior to 1st April, 1940.

In this view the cases must go back to the Rent Controller for fresh disposal after permitting the parties to let such evidence as they may choose to, if need be by witnesses being summoned at their instance. Our order should not be understood to mean that on the merits we have disapproved of the findings of the Rent Controller and the Appellate Authority. The Civil Revision Petitions are allowed and the applications are remanded to the Rent Controller for fresh disposal in the light of our above observations.

Mr. Tyagarajan, for the respondents, requested that a direction should be given by this Court that pending the final disposal of these petitions the tenants may not be compelled to pay at the rate originally fixed, namely Rs. 500 per month. He suggested that they may be permitted to pay at the rate of Rs. 200 per month, the rate fixed by the Rent Controller. But that rate has now been set aside. In the circumstances, we think it just and proper to direct each tenant to pay at the rate of Rs. 325, per month, which it is represented to us was the rate at which they were allowed to pay during the pendency of the appeals before the Appellate Authority, though they subsequently withdrew out of the sums so deposited Rs. 125 per month on the disposal of the appeals by the Appellate Authority. This payment will, of course, be subject to any final orders that may eventually be passed on the applications. There will be no order as to costs in these Civil Revision Petitions.

The rate of Rs. 325 will be from 1st February 1955. Of course the tenants will be entitled to credit of such amounts as they have already paid for the said period. They will also have three months time from to-day to pay the arrears according to this order.

The Rent Controller is directed to dispose of these applications expeditiously, the only new evidence being such as may be given by witnesses summoned at the instance of the parties. The Rent Controller shall give priority to these applications.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE RAJAGOPALA AYYANGAR.

S.K.R.S.S.T. Chidambaram Chettiar .. *Petitioner**.

v.

Muhammad Aliar Rowther and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Dispute as to who is entitled to ryotwari patta—Whether the Estates Manager has jurisdiction to decide—Order impugned as made without jurisdiction—Duty of Court to set aside under Article 226 of the Constitution of India, 1950.

Section 56 (1) (*c*) of Madras Estates Abolition Act specifically entrusts the determination of the dispute as to who among the rival claimants was entitled to the grant of patta, to the settlement officer, which means that the decision of such dispute was excluded from the competence of other autho-rities. It would be most illogical to construe the enactment as clothing the Estate Manager with power to decide the same dispute. The Estate Manager has no such jurisdiction to decide a disputeas towho among the rival claimants was entitled to the grant of patta. The rules published on 6th August, 1949 do not enable the Estates Manager to decide such question.

Where the order which is impugned is one passed without jurisdiction and is complained of by a party as prejudicial to his interests and this complaint is not frivolous or without substance it is the duty of the Court to set aside that order under Article 226 of the Constitution.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records relating to the Proceedings in D.Dis. No. 5811-55 on the file of the Revenue Divisional Officer, Pattukotti and to quash the entire proceedings from the commencement and ending with the order dated 4th August, 1955 and made by the Revenue Divisional Officer, Pattukottai in respect of the village Kumalur in Arantangi Taluk, West Tanjore District.

M. S. Venkatarama Ayyar for Petitioner.

T. R. Srinivasan and The Special Government Pleader (*V. V. Raghavan*) for Respondents.

The Court made the following

ORDER.—The jurisdiction of an Estates Manager to pass an order correcting the land register maintained under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari Act) is canvassed in this Writ Petition. The petitioner is one Chidambaram Chettiar. The Government published a notification in 1950 under section 1 (4) of the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948, Act XXVI of 1948 taking over the Kumalur estate in Arantangi taluk, Tanjore District. At the time of this taking over, the petitioner, Chidambaram Chettiar was admittedly in possession of 1·50 cents wet and 5 cents of dry land which are the subject-matter of dispute between the petitioner and the first respondent in this writ petition. There was no dispute that this land is ryoti land and Chidambaram Chettiar's name was accordingly entered in the land register as the person in possession of the land. On 31st July, 1954, the first respondent, Muhammad Aliar Rowther, purchased these and other items from one Muthuvairavan Servai. After his purchase the first respondent filed an application before the Estates Manager to register the lands mentioned in the petition in his name in the land register of Kumalur village. The jurisdiction of the Estates Manager was invoked under the powers stated to have been conferred on him by the rules made by the Government under the Act and published on 16th August, 1949. I shall be referring to the terms of the rules and to the scope of those rules in relation to the rest of the provisions of the Act a little later. The jurisdiction of the Estates Manager to conduct this enquiry to afford Muhammed Aliar Rowther the relief which he had prayed for was challenged by Chidambaram Chettiar. His objection was overruled and the matter was considered on its merits. This officer found after the enquiry that the person *prima facie* entitled to the grant of patta was not Chidambaram Chettiar but Muthuvairavan Servai and that as Muhammad Aliar Rowther had purchased the right of Muthuvairavan Servai he was entitled to have his name entered in the land register. The petitioner preferred an appeal to the Revenue Divisional Officer, Pattukottai but that was dismissed and he has thereupon moved this Court by the present writ petition.

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* W.P. No. 670 of 1955. 11th October, 1956.

The only point that is urged by the learned counsel for the petitioner and which is relevant for the disposal of this writ petition is as regards the jurisdiction of the Estates Manager to grant to the first respondent the relief which he claimed. In my judgment the contention urged on behalf of the petitioner is well founded. The scheme of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 which I shall hereafter refer as the Abolition Act in relation to this matter is briefly this :—

On the publication of a notification under section 1 (4) with reference to any estate the consequences set out in section 3 came into operation and these are :—

> " . . . .
>
> (*b*) the entire estate (including all communal land and porombokes other non-ryoti lands; waste lands; pasture lands, lanka lands, forests; mines and minerals; quarries rivers and streams. . . . . . . shall stand transferred to the Government and vest in them free of all encumbrances. .
>
> . . . .
>
> (*d*) the Government may, after removing any obstruction that may be offered, forthwith take possession of the estate, and all accounts registers, pattas, muchilikas, maps, plans and other documents relating to the estate which the Government may require for the administration thereof."

and then follows the proviso which is very important for the purpose of the present case :

> " Provided that the Government shall not dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta.
>
> (i) if such person is a ryot pending the decision of the Settlement Officer as to whether he is actually entitled to such patta.
>
> (ii) if such person is a landholder, pending the decision of the Settlement Officer and the Tribunal on appeal, if any, to it, as to whether he is actually entitled to such patta."

It will thus be seen that though under section 3 (*b*) the entire estate which would include even ryoti lands in the estate would stand transferred to the Government and vest in them, still the Government are directed not to dispossess any person of any land in the estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta. At this stage therefore, attention is directed to and concentrated upon the tenure of the land of which possession could be taken not so much regarding the identity of the person who is entitled to rights in the land. If, therefore, there were no rules devolving the power vested in the Government by this proviso the result would be that when once the Government consider the land is such that a person is entitled to the grant of ryotwari patta thereto, they would have to abstain from taking possession of it. On the terms of the proviso to section 3 (*d*) the Government would have no power to determine which among the competing claimants is entitled to remain in possession, for when once they decide that someone is entitled to remain in possession they are to desist from taking possession of the land. It is not as if the terms of the enactment did not contemplate disputes arising *inter se* between the persons claiming rights in regard to the same land. Section 56 (1) (*c*) constitutes the Settlement Officer the authority to decide such disputes. Section 56 (1) enacts, to quote only the material words :

> "Where after an estate is notified a dispute arises as to (*c*) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer".

and sub section (2) provides for appeals against the orders of the Settlement Officer. The position, therefore, is that while the proviso to section 3 (*d*) enables the Government to determine whether any land is ryoti land in possession of a ryot section 56 (1) (*c*) enables the decision of any dispute which arises as to who that ryot is. Thus understood the two provisions which relate to different states each enacted with a specific but different purpose dovetail into each other.

The provisions of the rules devolving this power on the Officers of the Government have to be understood in the light of this basic feature. The rules published on 16th August, 1949 and under which the present application was filed provide :

> " The powers specified in column 2 of the Schedule below which are conferred on the Government by the sections of the Act specified in the corresponding entry in column (1) of the said Schedule may be exercised also by any of the authorities or officers specified in the corresponding entry in column (3) thereof subject to such control as may be specified in the said column (3) and also subject to revision by the Government."

Section	Power	Authorities or officers by whom the powers should be exercised.
3 (*d*) proviso ..	Power to decide whether a ryot or a landholder is *prima facie* entitled to a ryotwari patta or not.	Manager of the estate but.....

The question is whether this rule enables the Estates Manager to decide as to who among the persons the petitioner and the first respondent is *prima facie* entitled to a ryotwari patta. I am clearly of the opinion that the Estates Manager had no power to so determine. In the first place the Estate had been notified and taken over as early as 1950 and it was not part of any matter in dispute in connection with the taking over. That the land in dispute was ryoti land in regard to which a person would be entitled to a ryotwari patta was not in controversy. The only question for determination was who among the rival claimants was entitled to the grant of a patta. The determination of this dispute was specifically entrusted by the provisions of the enactment to the Settlement Officer under section 56 (1) (*c*) which necessarily means that the decision of such a dispute was excluded from the competence of other authorities for it would be most illogical to construe the enactment as clothing the Estates Manager with power to decide the same dispute and give a decision as to what *prima facie* the rights of the parties are, leaving it to the Settlement Officer to decide the same matter so as to be finally binding on the parties. In my opinion, the Act never intended this anomaly and it is, therefore incapable of that construction. In my judgment, therefore the Estatese Manager had no jurisdiction to entertain the application of the first respondent or to decide it.

Learned counsel for the first respondent, however urged that even if this were the real position it was not proper and, therefore, not necessary to interfere with the order of the Estates Manager since this officer had considered the evidence on the merits and it was only on the basis of a very strong case on the merits that the order had been passed. Counsel, further urged, that both the Estates Manager as well as the Revenue Divisional Officer on appeal had both expressly stated that the determination of the rights of the parties in these proceedings was tentative and was subject to the decision of the Settlement Officer in proceedings that would certainly be open to be initiated by the present petitioner. On this ground it was urged that no harm had been done to the petitioner and no advantage derived by the first respondent and there was, therefore, no necessity to set aside the order of the Estates Manager. I am wholly unable to agree with these contentions of the learned counsel. The very fact that the first respondent considered it necessary to file an application and obtained an order, resisted the appeal therefrom and is now defending the present writ petition furnished enough proof that the first respondent does consider that it is to his advantage to have this order in his favour. If so, it would follow that the order does prejudice the petitioner. Where the order which is impugned is one passed without jurisdiction and is complained of by a party as prejudicial to his interests and this complaint is not frivolous or without substance, I consider that it is the duty of this Court to set aside that order under Article 226 of the Constitution. No doubt the only effect of the impugned order might be to determine who among the petitioners and the first respondent should initiate proceedings before the Settlement Officer but even this I cannot consider as of no moment or significance. I therefore, consider that the objection urged as to why this Court should decline to interfere is not well founded. The writ petition is allowed. The rule is made absolute and the order of the Estates Manager confirmed by the Revenue Divisional Officer is set aside. There will, however, be no order as to costs.

V.S.

Petition allowed.
Rule made absolute.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Govindaswami Chetti	.. *Petitioner**
v.	
Vadivelu Naicker and others	.. *Respondents.*

Madras District Municipalities Act (*V of* 1920)—*Rules for conduct of elections—Rule* 11—*Scope—Election Commissioner if has power to declare a candidate elected by casting lots where there is equality of votes on deciding that certain tendered votes were valid.*

An Election Commissioner to decide election disputes under the Municipal law is a statutory creation and his powers have to be sought within the four corners of that statute and the statutory rules. He could claim no inherent powers. In deciding election disputes, in cases of equality of votes between the candidates, the Election Commissioner has no power to decide the issue by casting lots as no such power is given to him by the Act or Rules. The power conferred by rule 11 (2) (*a*) of the Rules for the conduct of election does not carry with it the power to determine by lot. It may not be permissible to import the specific statutory provisions of the Representation of the People Act into the statutory rules framed for the decision of election disputes under the District Municipalities Act.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Election Commissioner (Principal Subordinate Judge) of Chingleput in O.P. No. 119 of 1955 and quash the order dated 6th April, 1956, made therein.

K. Bashyam and *C. Natarajan* for Petitioner.

S. Ramachandra Ayyar, and *V. Srinivasan* for the Special Government Pleader (*V. V. Raghavan*) for Respondents.

The Court made the following

ORDER :—Elections were held for the 16th Ward of the Kancheepuram Municipality on 10th October, 1955. There were five candidates, the petitioner, the 1st respondent and respondents 3 to 5. The votes were counted on 12th October, 1955, by the Election Officer. The Election Officer held that the petitioner had obtained 320 votes as against 319 votes counted in favour of the 1st respondent. The Election Officer declared the petitioner duly elected. The 1st respondent challenged the validity of that declaration in O. P. No. 119 of 1955.

One of the questions at issue was, how the tendered votes should be treated. The Election Commissioner came to the conclusion that the votes tendered by P. Ws. 1, 4 and 5 should be counted, as they were the real voters. Of these, one vote went to the 1st respondent, with the resulting position of equality of votes between the petitioner and the 1st respondent, each with 320 votes.

The Commissioner thereupon proceeded to decide by casting lots who, as between the petitioner and the 1st respondent, should be declared elected. The 1st respondent won, and a declaration to that effect was issued.

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* Writ Petition No. 429 of 1956. 13th November, 1956.

It was the validity of that declaration that the petitioner challenged by his application under Article 226 of the Constitution for the issue of a writ of *certiorari.*

The Election Commissioner purported to exercise an inherent power in the absence of any specific provision in the rules for the determination of election disputes. The Election Commissioner was of statutory creation, and, as his powers had to be sought within the four corners of the Statute and the statutory rules which brought the Tribunal into existence, the Election Commissioner could claim no inherent power and I do not understand the learned counsel for the 1st respondent to urge that apart from the rules any inherent power could be claimed by the Election Commissioner.

While rule 33 of the rules for the conduct of elections of Municipal Councils specifically provides for determination by lot to be cast by the Election Officer as to who should be declared elected, where there was an equality of votes, no such specific provision has been made in the rules for the determination of election disputes. Under rule 11 of the rules for the determination of election disputes the Election Commissioner has jurisdiction to declare the election of the returned candidate void. In this case it was the petitioner that had been declared elected on the basis, that he had secured more votes, one more vote than the 1st respondent. That basis failed, when the tendered votes were taken into account. As the petitioner had not secured a majority of votes, his election was liable to be set aside, and the Election Commissioner had jurisdiction to set it aside under rule 11 (1).

Rule 11 (2) no doubt empowers the Election Commissioner to declare any other party to the petition to have been duly elected. But that does not give the Election Commissioner the power to determine by lot who, as between the petitioner and the 1st respondent, should be declared elected.

Learned counsel for the 1st respondent urged that rule 33 of the rules for the conduct of elections was only a rule for counting votes. He relied upon the statutory principles embodied in sections 65 and 102 of the Representation of the People Act (XLIII of 1951), and said that casting lots would really mean adding one more vote and no more. It may not be permissible to import the specific statutory provisions in the Representation of the People Act into the statutory rules framed for the decision of election disputes under the District Municipalities Act. As I said, the Election Commissioner could claim no inherent power. He could claim only the powers specifically conferred upon him, and these powers do not include the power to determine who should be declared elected by casting lots. I am unable to accept the contention of the learned counsel for the 1st respondent, that rule 33, which specifically empowered the Election Officer to act in the contingency and in the manner specified therein is merely a rule applicable to counting, whatever both contingency in which the need to count arises. Nor am I able to accept the contention of the learned counsel for the 1st respondent that the power of casting lots must be deemed to be incidental to the specific power conferred upon the Election Commissioner by rule 11 (2) (*a*). The need to exercise jurisdiction conferred by rule 11 (2) (*a*) arises after a declaration of an election has been set aside under rule 11 (1). But the power conferred by rule 11 (2) (*a*) does not carry with it the power to determine by lot. If, for example, on the evidence on record it had been established that one of the parties to the petition, who had been a candidate, had in reality secured more votes, a declaration under rule 11 (2) (*a*) could be issued on such a feature of evidence.

On the short ground that the Election Commissioner had no jurisdiction to issue the declaration he did in favour of the 1st respondent on the basis of lots the rule will have to be made absolute and the order of the Election Commissioner set aside.

Learned counsel for the petitioner contended that there was really no evidence on record to sustain the finding of the Election Commissioner, that P.W. 1, whose vote has been tendered before the Election Officer, was really a registered voter. His further submission was that, if the tendered vote had been rejected by the Election Commissioner, the position would have been that the petitioner's majority had to prevail. I am unable to accept the contention of the learned counsel for the petitioner, that there was no evidence on which the Election Commissioner could come to the conclusion that the identity of P.W. 1 with the registered voter had been established, and the further finding that the vote that P.W. 1 tendered should have been accepted.

The rule is made absolute. The order of the Election Commissioner, in so far as it declared the 1st respondent duly elected, is set aside. The petitioner will be entitled to the costs of this petition payable by the 1st respondent. Counsel's fee Rs. 100.

R.M. ——— *Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The Commissioner for the Hindu Religious and Charitable Endowments, Madras .. *Petitioner**

v.

S. S. Janakirama Ayyar and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), section 103 (e), (ii), Scope—Appointment of trustees under a scheme framed by the Court—Whether the Court continued to be the proper authority after the Act came into force.

Section 103 (e) (ii) of the Act clearly provides that all powers conferred and all duties imposed on a Court by a scheme settled by a Court shall be deemed to have been conferred or imposed on the Area Committee or the Commissioner as the case may be. The power and duty of filling up vacancies among the resident trustees should be deemed to have been conferred or imposed on the Commissioner in this case after the passing of the Act and the Court did not continue to be the proper authority for that purpose.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Tanjore, dated 10th October, 1952 and made in application for the posts of three resident Trustees for Sri Bangaru Kamakshiamman Temple, Tanjore.

The Advocate-General (*V. K. Thiruvenkata Chari*) and the Government Pleader (*C. A. Vaidialingam*), for Petitioner.

R. Gopalaswami Ayyangar, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is a petition filed by the Commissioner for Hindu Religious and Charitable Endowments, Madras, for a revision of the order of the learned Subordinate Judge, Tanjore, dated 10th October, 1952, in the following circumstances. A scheme was framed for Sri Kamakshi Amman Temple at Tanjore by the Additional Subordinate Judge of Tanjore in O.S. No.1 of 1919. Clause (2) of that scheme provided that the management and control of the affairs of the temple and its properties shall vest in five trustees of whom two were to be elected by ballot and the three others to be appointed by the Court once in five years from among the Brahmin residents within the municipal limits of Tanjore who by their character, position, education and ability command the confidence of the community. It appears that of the three resident trustees who had been appointed by the Court two resigned in September, 1952 and the third ceased to be a trustee by efflux of time sometime in October, 1952. Thereupon applications were called for to fill up the vacancies and fifteen applications were received and from them the learned Subordinate Judge selected three. The managing trustee of the temple brought to the notice of the learned Subordinate Judge a communication from the Commissioner for Hindu Religious and Charitable Endowments, Madras, which drew the attention of the Court to section 103 (*e*) (ii) of the Madras Hindu Religious and Charitable Endowments Act, 1951 and it was submitted that the Commissioner was the competent authority, to make the appointment of the three resident trustees. The learned Judge held that it was the Subordinate Judge, Tanjore, who was the proper authority to appoint the trustees and not the Commissioner. He came to this conclusion because in his opinion the two decisions of this Court in *Shri Shirur Mutt* v. *Commissioner, Hindu Religious Endowments Board*[1], and *Devaraja Shenoy* v. *State of Madras*[2], must be deemed to have held section 20 of the Madras Hindu Religious and Charitable Endowments Act, 1951, to be invalid, and, therefore the Commissioner could have no power of management of religious institutions like the temple in question. The Commissioner for Hindu Religious and Charitable Endowments, Madras, has filed this revision petition challenging the correctness of the view taken by the learned Subordinate Judge. The learned Advocate-General who appeared for him, intimated to us that the Commissioner was more interested in the general principle than in upsetting the particular appointments made by the learned Subordinate Judge.

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* C.R.P. No. 1162 of 1953. 4th February, 1957.

In our opinion, the learned Judge was entirely wrong in holding that the Sub-Court, Tanjore, continued to be the proper authority to appoint the three resident trustees under clause (2) of the scheme. His reference to section 20 of the Madras Hindu Religious and Charitable Endowments Act, 1951, was inappropriate, as it is not the case of the Commissioner that his power to appoint the trustees in question is derived from the provisions of section 20 of the Act. The relevant and material provision is, as already mentioned, section 103 (*e*) (ii) of the Act. That clearly provides that all powers conferred and all duties imposed on a Court by a scheme settled by a Court shall be deemed to have been conferred or imposed on the Area Committee if the institution is subject to the jurisdiction of such a committee and on the Commissioner, in other cases, and the Area Committee or the Commissioner, as the case may be shall exercise such powers and discharge such duties in accordance with the provisions of the scheme subject to such restrictions and conditions, if any, specified in the scheme. Undoubtedly the power and duty of filling up vacancies among the resident trustees is power and duty imposed by the scheme. Therefore such power after the passing of the Act of 1951, should be deemed to have been conferred or imposed on the Area Committee or the Commissioner, the Commissioner in this case. The learned Judge was therefore wrong in holding that the Sub-Court is the only proper authority to appoint the resident trustees under clause (2) of the scheme.

As already mentioned, it is not necessary to interfere with the order of the learned Subordinate Judge as such appointing three persons as resident trustees. With the above expression of opinion, the Civil Revision Petition is dismissed. But there will be no order as to costs.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAMASWAMI.

A. N. Subramanian .. *Appellant**

v.

A. S. Kalyanarama Iyer and others .. *Respondents.*

Hindu Women's Rights to Property Act (XVII of 1937), *section* 3 (1) *and* (2)*—Applicability—Property taken by coparcener at partition of family properties with sons—Separate or joint family property—Right of widow in such property.*

Property which a Hindu coparcener obtains at a family partition is not his separate property within the meaning of section 3 (1) of the Hindu Women's Rights to Property Act, but is joint family property, though he may, after partition, have absolute powers of alienation so long as there is no son born to him after partition. It must be deemed to be an interest in joint family property within the meaning of section 3 (2) of the Act, in which his widow would have an interest.

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[1] (1952) 1 M.L.J. 557.

[2] (1952) 2 M.L.J. 481.

* L.P.A. No. 364 of 1952. 21st September, 1956.

Umayal Achi v. *Lakshmi Achi*, (1945) 1 M.L.J. 108 : 1945 F.L.J. 8 : 1945 F.C.R. 1 (F.C.) *applied.*

Anant v. *Shanker*, (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.) and *Visalamma* v. *Jagannadha Rao*, A.I.R. 1955 Orissa 160, *relied on.*

(1952) 2 M.L.J. 575, *differed from.*

Quaere.—Whether the widow of such a coparcener would, under section 3 (2), be entitled exclusively to the property left by her husband or should share them with the divided son or sons.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Krishnaswami Nayudu[1] dated 30th July, 1952 and passed in Appeal No. 484 of 1949 preferred against the decree of the Court of the Subordinate Judge of Ottapalam in O.S. No. 55 of 1946.

N. Sundara Ayyar, for Appellant.

C. S. Swaminadhan, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the judgment of Krishnaswami Nayudu, J.,[1] in A.S. No. 484 of 1949 arises out of a suit for partition filed by the appellant herein in the Court of the Subordinate Judge of Ottapalam, O.S. No. 55 of 1946. The plaintiff is the son of one Narayana Ayyar. Narayana Ayyar and the first defendant herein, Kalyanarama Ayyar, were the sons of one Subramania Ayyar who died in 1945 leaving behind him his widow, the second defendant in the case, and his two sons. It is common ground that under a deed of partition dated 4th February, 1935, Exhibit B-1, there was a partition between the father Subramania Ayyar and his two sons. Separate properties were allotted to the shares of each of the three coparceners. The first question which arises in this appeal relates to the rights of the seco d defendant, the widow of Subramania Ayyar, in the non-agricultural properties left by him. She claimed a share relying on the provisions of the Hindu Women's Rights to Property Act and her claim was accepted by the trial Judge. On appeal by the plaintiff, Krishnaswmi Nayudu, J., confirmed the decision of the trial Judge on this point. Before us Mr. N. Sundaram Ayyar has challenged the view taken by the trial Judge and Krishnaswami Nayudu, J. It is sufficient to deal with the reasoning of Krishnaswami Nayudu, J., for the purpose of this appeal.

The learned Judge held that the second defendant as the widow of Subramania Ayyar was entitled to a share in the property which he got at the paritition and which he died possessed of under section 3, sub-section (1) of the Hindu Women's Rights to Property Act. That sub-section in so far as it is material runs thus—

> "When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more then one widow all his widows together, shall subject to the provisions of sub-section (3) be entitled in respect of property in respect of which he dies intestate to the same share as a son."

Krishnaswami Nayudu, J., held that the property which Subramania Ayyar got for his share at the partition with his sons would be separate property within the meaning of that expression in the above section and therefore the widow would be entitled to the benefit of that provision. Mr. Sundaram Ayyar contended that this view is opposed to the principle of the decision of the Federal Court in *Umayal Achi* v. *Lakshmi Achi*[2]. In that case the last owner of the suit properties, one Arunachalam Chettiar died leaving his two widows and the widow of a predeceased son, who claimed a share basing her right on the first proviso to section 3 (1) of the Act which runs thus :—

> "Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predecased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son."

When he died, Arunachalam Chettiar was the sole surviving coparcener in the joint family which owned the suit properties. It was held by the learned Judges of the Federal Court that the property held by a person as the last surviving coparcener of

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1. (1952) 2 M.L.J. 575.
2. (1945) 1 M.L.J. 108 ; 1945 F.L.J. 8 : 1945 F.C.R. 1 (F.C.).

a joint family could not be regarded as 'separate property' within the meaning of section 3 (1) of the Act. Krishnaswami Nayudu, J., thought that the decision in that case must be held to be confined to the case of a sole surviving coparcener and as in the present case the property was obtained by the last male holder as his share at a partition of family property, the decision would have no. direct application. He felt himself therefore free to take the view that property obtained by a member of a joint family at a partition would be separate property within the meaning of section 3 (1) of the Act. We cannot agree with him. The principle of the Federal Court decision would, in our opinion, equally apply to the case of property taken by a member of the joint family at a partition of family properties. Indeed, throughout the judgment of Varadachariar, J., who delivered the leading judgment, property held by a sole surviving coparcener and property which a coparcener is allotted at a family partition are mentioned together as standing on the same footing (*vide* pages 115, 116 and 117). The reasoning is to be found in the following observations of Varadachariar, J. :

> " . . . . . judged by the test of power of disposition, two other kinds of property held by a Hindu governed by that law, *viz.*, property obtained as his share at a partition and property held by him as a sole surviving coparcener may. in some measure, resemble self-acquired property. There is however this difference between them, *viz.*, that in the case of self-acquired property, the owner's power of disposition will continue to remain undiminished throughout his lifetime, unless he chooses voluntarily to throw it in the joint family stock, whereas in the case of the other two kinds of property his power of disposition will become qualified and his interest reduced the moment a son is born to him or the widow of a predeceased coparcener takes a boy in adoption. It would not therefore be right to place these three kinds of property on the same footing merely on the ground that at a particular point of time, the owner may enjoy unrestricted powers of disposition over them."

We therefore cannot accept as correct the distinction which Krishnaswami Nayudu, J., draws between the present case and the case decided by the Federal Court on the ground that in the one case it was property held by a sole surviving coparcener and in another case it was property obtained by a coparcener at a family paritition. Differing from him we hold that the widow, the second defendant, cannot obtain any right under section 3 (1) of the Act.

We however think that as a consequence of the reasoning of the Federal Court in the above cases, the second defendant would be entitled to the benefit of sub-section (2) of section 3 which is as follows :

> "When a Hindu governed by any school of Hindu Law other than the Dayabagha School or by customary law dies having at the time of the death an interest in a Hindu Joint family property his widow shall subject to the provisions of sub-section(3), have in the property the same interest as he himself had.".

If the property which a coparcener obtains at a family partition is not separate property within the maning of section 3 (1) of the Act, it must be deemed to be an interest in Hindu Joint family property within the meaning of sub-section (2) of section 3. If the fact that on the birth of a son, such son would have a right by birth in the property obtained by a coparcener at a partition prevents us from holding that such property is separate property, it follows from that very fact that it should be deemed to be joint family property. As pointed out by the Privy Council in *Anant* v. *Shankar*[1], a coparcenary must be held to subsist so long as there was in existence a widow of a coparcener capable of bringing a son into existence by adoption. In that very case, their Lordships of the Judicial Committee refer to the property held by a sole surviving coparcener as joint family property in his hands. Likewise it should be held that the property which a coparcener obtains at a partition is joint family property though the coparcener may, after the partition have absolute powers of alienation so long as of course there is no son born to him after the partition, who would on birth be entitled to a share in such property. We find that the Orissa High Court has construed section 3 (2) of the Act in the same manner as we have indicated above in the case of *Visalamma* v. *Jagannadharao*[2] In that case the learned Judges held that where a Hindu has effected a partition with his only son and the parties are governed by the Madras School of Hindu Law the properties which fell to the share of the father are not his separate properties for the purpose of section 3 (1) but are joint family properties within the meaning of section 3 (2) of the Act.

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[1] (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.). [2] A.I.R. 1955 Orissa 160.

The more difficult point which however does not fall for decision in this case is "what is the share to which the widow would be entitled in a case like the present?" Will she be entitled exclusively to the property left by her husband or should she share them with the two divided sons? In the *Orissa case*[1], the learned Judges held that the widow would be entitled to the entire interest to the exclusion of the divided son. It may be a matter for argument that if the property held by the divided member of the family is deemed to be joint family property, the other members of the erstwhile coparcenary must also be deemed to have an interest in them. We refrain from expressing our final opinion on this matter because the trial Judge awarded to the second defendant only a third share along with the plaintiff and the first defendant and there has been no appeal by the second defendant claiming the entire property. In the result we confirm the decree of the trial Judge declaring that the second defendant was entitled to a third share in the non-agricultural properties left by Subramania Ayyar. Actually this finding becomes in the main academic, because the second defendant died after the decree of the trial Court. This finding will be material only for deciding the question of mesne profits.

The next question relates to the rights of the plaintiff in two items, items 29 and 30 of the schedule A to the plaint. Item 29 is a kudiyiruppu on which there was a house at the time of the family partition. In the partition deed, item 29 was set out in schedule D. It was described as Madham Kudiyiruppu in tiled house, etc., existing therein. The scheme of the partition in respect of this property was that an undivided half was allotted to the father and the other half to the first defendant. Clause 6 of the partition deed makes this clear. What has given rise to the controversy between the parties is a part of clause 11 which runs as follows :—

> "It has been agreed and settled that though the Madham Kudiyiruppu mentioned in D Schedule belonged equally to individuals Nos. 1 and 2 (Subramania Ayyar and defendant 1) as described in paragraph 6 above, No. 1 and his wife Lakshmi Ammal mother of Nos. 2 and 3 have full right and liberty to reside in that Madham Kudiyiruppu and that on the death of the aforesaid persons the said Madham Kudiyiruppu will devolve upon No. 2 exclusively and that No. 3 has no right in it."

No. 3 is the father of the plaintiff in the suit. By virtue of this provision, the learned Judge Krishnaswami Nayudu, J., held that on the death of Subramania Ayyar, the first defendant became exclusively entitled to the entire property subject only to the right of residence of his mother. Mr. Sundaram Ayyar's contention was that the clause expressly provides for the devolution of Subramania Ayyar's share on the first defendant only on the death of both Lakshmi Ammal and Subramania Ayyar and till the death of both there is no vesting of Subramania Ayyar's share in the first defendant and thus there is a vacuum as it were during the period between the death of Subramania Ayyar and the death of Lakshmi Ammal. Legally such a vacuum is not permissible and therefore the provision is not valid and the property should be divided between the two sons, plaintiff's father and the first defendant, as divided sons of the father ; and now that we have held that Subramania Ayyar's widow is also entitled she will also be entitled to a share likewise. Though there is force in this contention, we think that on a reasonable costruction of this clause, the intention of the parties is clear, *viz.*, that Subramania Ayyar's share should devolve on the first defendant subject only to the reservation of the right of residence in favour of the widow of Subramania Ayyar. The widow had no proprietary right in her husband's share of the property and all that she was entitled to was only a right of residence. The clause only provides for the continuance of the right of residence conferred on the widow even after the death of Subramania Ayyar. Till her death the first defendant may not be said to be exclusively entitled to the property because there would be this burden of his mother's right of residence. We agree with Krishnaswami Nayudu, J., in his construction of this clause and hold that on the death of Subramania Ayyar, the first defendant became entitled to his half share in item 29.

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[1] A.I.R. 1955 Orissa 160.

Item 30 is a house admittedly built subsequent to the partition and it has been now found that the house was built with the separate funds of Subramania Ayyar. Obviously clause 11 of the partition deed did not and could not, relate to the house which came into existence after the partition. But Krishnaswami Nayudu, J., construed that no distinction could be made between the old house in item 29 and the new house built subsequent to the partition. But we think otherwise. Clause 11 cannot possibly affect the rights of the parties under the general law to the house which admittedly was not in existence at the date of the partition. Take for example, the right of residence. It cannot be said that Subramania Ayyar and his wife would have a right of residence in the new house built by him only because of the provision in clasue 11. Subramania Ayyar and his wife would be entitled to reside in the new house built by the former in his own right. Item 30 must therefore be treated as the separate property of Subramania Ayyar which devolved on his heirs in accordance with Hindu Law read with the provisions of the Hindu Women's Rights to Property Act. We set aside the decree and judgment of Krishnaswami Nayudu, J., so far as item 30 is concerned and direct that the value of the building which is item 30, be included among the partible properties in which the plaintiff will have a third share. How exactly the division should be made between the parties must be left to the final decree proceedings. As the widow had died the plaintiff and the first defendant would now be entitled each to a moiety in item 30. The preliminary decree will be drafted accordingly.

The appeal is allowed in part and dismissed otherwise in accordance with the above findings. There will be no order as to costs either in this appeal or before Krishnaswamu Nayudu, J.

P.R.N. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMSWAMI GOUNDAR.

The Firm of AL. AR. Arunachalam Chettiar by Partners AL. AR. Kalairaja Chettiar and others .. *Petitioners**

v.

The Kaleeswarar Mills, Ltd., Coimbatore, and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Writ of* mandamus—*Scope—Resolution of a company terminating the Managing Agency rights conferred by the Memorandum and Articles of Association—Writ to forbear from enforcing the resolution—Maintainability.*

No writ of *mandmus* can issue the object of which is to declare the rights of parties. A writ under Article 226 can issue only in accordance with the well established principles analogous to those formulated in section 45 of the Specific Relief Act. A writ of *mandamus* does not lie to enforce a contractual obligation. The applicant must show that there resides in him a legal right to the performance of a legal duty by the party against whom the *mandamus* is sought. In order therefore that *mandamus* may issue to compel something to be done it must be shown that the Statute imposes a legal duty. The writ is only granted to compel the performance of the duties of a public nature. The Court will as a general rule and in the exercise of its discretion refuse a writ of *mandamus* when there is an alternative specific remedy at law which is not less convenient, beneficial and effective.

Case-law discussed.

The Managing Agency rights conferred under the Memorandum and Articles of Association are merely contractual obligations and the passing of the resolution was not in the nature of a public duty performed by the company, the matter being a purely a private right between the petitioners and the company. The remedy by way of a regular suit was open to the petitioners. A writ of *mandamus* cannot be maintained in these circumstances.

There is no analogy between hereditary rights of trusteeship and Managing Agency rights and such Managing Agency rights cannot be property within the meaning of Article 19 (1) (*f*) of the Constitution.

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* Writ Petition No. 712 of 1956. 14th August, 1956.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or any other appropriate writ, order or direction directing the respondents to forbear from enforcing in any manner the resolution passed by respondents 2 to 9 on 7th April, 1956 and also the further proceedings of respondents 2 to 9 subsequent thereto convening the annual General body meeting of 29th June, 1956.

M. K. Nambiar, K. K. Venugopal and *K. Parasurama Ayyar*, for Petitioners.

K. Rajah Ayyar, K. S. Ramamurthi, K. V. Narayanaswami, V. Tyagarajan, M. A. Rajagopalan and *T. R. Ramachandran*, for Respondents.

The Order of the Court was delivered by

Ramaswami Gounder, J.—This is a petition filed under Article 226 of the Constitution for a writ of *mandamus* or any other appropriate writ or order, directing respondents to forbear from enforcing in any manner the resolution passed by respondents 2 to 9 on 7th April, 1956. There was a prayer for a similar writ in regard to the convening of the annual general body meeting of 29th June, 1956; but we are leaving that out of consideration, because that date is now long past and no meeting took place on that date. The petitioners are a firm of AL.AR. Arunachalam Chettiar, represented by four partners whose names are set out in the petition. The first respondent is the Kaleeswarar Mills, Ltd., Coimbatore and respondents 2 to 9 are its present Directors. The first respondent-Mills was incorporated as a limited liability Company in 1906 with the object of carrying on the business of spinning and weaving of cotton yarn and cloth. In consideration of the services rendered by the petitioner-firm in the promotion of the Company, it was then agreed, and it was also put into the Memorandum of Association as clause 6, which runs thus :

> "In consideration of the services rendered by the Firm of M/S AL. AR. Arunachalam Chettiar in promoting and starting the Company, the Firm of M/S AL. AR. Arunachalam Chettiar and the firm of Devan Bahadur P. Somasundaram Chettiar of Devakottah their Heirs, Executors or Administrators shall hereditarily be the Secretaries and Bankers of the said Company and the said firms as from time to time constituted shall continue to be the Secretaries and Bankers of the Company and Mr. P. Somasundaram Chettiar shall be appointed the Local Agent of the Company by the said Secretaries and Bankers and shall continue to be such Local Agent of the Company until his life time, and his successor or successors shall be appointed by the said Secretaries and Bankers. The Secretaries and Bankers shall receive a commission of 2¼ pies per lb. on all yarn and cloth manufactured by the Company as their remuneration including that of the local agent so appointed by them."

The hereditary rights of being the secretaries and the bankers of the Company under the memorandum were also incorporated and detailed in the Articles of Association 131 to 136. It will thus be seen that in conformity with the memorandum and Articles of Association the first respondent mills was being managed by the two firms specified therein. The said Somasundaram Chettiar functioned as their Local Agent till his death in 1929, leaving his adopted son, P.S. Sathappa Chettiar. The latter acted as Local Agent for some time, and he died in March, 1950. But even earlier, as a result of the compromise decree obtained in some suits filed in the Coimbatore District Court, AL.AR. Kalairaja Chettiar, one of the members of that firm, was finally appointed as the Local Agent.

That continued till March, 1954, when certain important changes were introduced in the management of the affairs of the Company. All that is recorded in the minutes of the proceedings of the Board of Directors held on 20th March, 1954. It took note of the fact that the financial position of the Mills was unsatisfactory and that the Mills was not working for more than a fortnight resulting in a huge loss to the Mills, as also the attachment of the properties of the Mills by the Income-tax Department, and the further fact that the Mills could not start work without adequate finance raised for that purpose. The Local Agent, Kalairaja Chettiar withdrew from his office for a period of two years, agreeing not to exercise during the period of his leave any of the powers, authority and duties pertaining to the office of the Local Agent, though he was permitted to continue as the ex-officio Director of the Company. It was further resolved that the offer of Sri P. S. S. Somasundaram Chettiar, the adopted son of the said Sathappa Chettiar, to advance or to procure the advance of 15 lakhs of rupees to the Company on the simple mortgage of the assets of the Mills was accepted and he was appointed as the General Manager of the Company entrusted with the whole administration and the management of the affairs of the Mills, subject, of course, to the control and directions of the Board of Directors for a period of two years or until the loan to be advanced or the advance of which is procured by him is repaid with interest. The result was that in March, 1954, the petitioners' firm as well as their Local Agent, Kalairaja Chettiar, a member of that firm, withdrew from their managing agency and agreed to vest the entire management of the Mills in the hands of Somasundaram Chettiar as the General Manager, because he agreed to finance the Mills and put it into working order. Accordingly, Somasundaram Chettiar was in full management and control of the affairs of the Mills not only for the period of two years mentioned in the resolution, but he continues to hold that office down to this date.

While so, after the coming into force of the new Companies Act, on 1st April, 1956, and on the basis of some legal opinion which the Company is said to have obtained as to the definition of "Managing Agent" in section 2 (25) of that Act, the Board of Directors met on 7th April, 1956 and passed a resolution to this effect :

> " Resolved to record that with the coming into force of the Indian Companies Act, 1956, the Secretaries and Bankers of the Company have ceased to be entitled to the office of Secretaries and Bankers of the Company and that accordingly the said office has become vacant by operation of law on and from 1st April, 1956.
>
> That as a consequence, the power and authority of the Local Agent of the Secretaries and Bankers of the Company have also ceased and determined that the said office has become vacant on and from 1st April, 1956 and that the ex-officio Director has vacated his office ".

The Board of Directors have not taken any tangible action on that resolution. It is that resolution that has given rise to this writ petition. On the facts alleged in the writ petition itself, it would appear that the petitioners had withdrawn from their office as Managing Agents and surrendered the right of management to Somasundaram Chettiar as General Manager in accordance with the resolutions of March, 1954. Since then, the said Somasundaram Chettiar has been in actual management and control of the affairs of the Company and not the Managing Agents. It may be that the rights as Managing Agents continue; but the point is that they are not in actual enjoyment of those rights. The prayer in the present petition is not for restoration to that office. It is to restrain the respondents from enforcing that resolution. But if the petitioners are not in possession of their office as Managing Agents, then, it is difficult to see how that resolution can be enforced against them. There can be no question, in pursuance of that resolution, of their being thrown out of the office hereafter. If so, the object of this writ is reduced to one for a declaration that the resolution of 7th April, 1956 was invalid and inoperative. No writ of *mandamus* can issue, the object of which is to declare the rights of the parties. If authority were needed for that proposition, it will be found in *Naubat Rai* v. *Union of India*[1], and in *Dubar Goala* v. *Union of India*[2]. In the latter case, at page 498, it was observed:

> "Further, it is inappropriate to grant a declaration in an application under Article 226 that a particular contract is illegal and therefore unenforceable because it contains a provision for Begar or forced labour."

We have not entered into the merits of the rights put forward by the petitioners that is to say whether the legal opinion on which the resolution of 7th April, 1956 was passed was sound and whether the rights which the petitioners undoubtedly had as Managing Agents were in any manner affected by the definition of "Managing Agent" in the new Companies Act. We do not choose to investigate into those questions for the reason that even assuming that the petitioners had those rights intact and unaffected by the new Act, Mr. K. Rajah Ayyar for the respondents contended as a preliminary objection that, in the circumstances of this case, a writ of *mandamus* should not issue from this Court. Under section 50 of the Specific Relief Act of 1877 as it then stood, neither the High Court nor any Judge thereof shall thereafter issue any writ of *mandamus*. That section has now been superseded by the present section 50 which is to the effect that nothing in that chapter shall affect the power conferred on a High Court by clause (1) of Article 226 of the Constitution. As a first impression, it would appear as if the terms of Article 226 are of much wider import and give almost unlimited power to issue a writ of *mandamus* against any person and under any circumstances and for any purpose whatever. But as we shall show presently, it is now well established that the seemingly wide powers under that article ought to be exercised only according to well established principles though under the Specific Relief Act a writ of *mandamus* as such was not permissible, but orders and directions in the nature of *mandamus* could be issued on applications made under section 45 of the Act. That section only reproduces the general principles of English Courts. Under the English law, the grant of a writ of *mandamus* is, as a general rule, a matter for the discretion of the Court. It is not a writ of right and is not issued as a matter of course. Some of the conditions precedent to the issue of a writ of *mandamus* appear to be : (1) the applicant for a writ of *mandamus* must show that there resides in him legal right to the performance of a legal duty by the party against whom the *mandamus* is sought; (2) the Court will not interfere to enforce the law of the land by the extraordinary remedy of a writ of *mandumus* in cases where an action at law will lie for complete satisfaction; in order, therefore a *mandamus* may issue to compel something to be done, it must be shown that the statute imposes a legal duty ; (3) the writ is only granted to compel the performance of the duties of a public nature ; and (4) the Court will, as a general rule and in the exercise of its discretion, refuse a writ of *mandamus* when there is an alternative specific remedy at law, which is not less convenient, beneficial and effective. We find that more or less the same principles are embodied in section 45 of the Specific Relief Act. It enables the High Courts to make an order requiring any specific act to be done or forborne by any person holding a public office or by any Corporation or inferior Court of Judicature. The section contains a number of provisos, of which clause (*a*) is to the effect that an application for such order shall be made by some persons whose property franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act. Of course, unless some personal right of the applicant is interferred with, there can be no remedy by the writ of *mandamus*. As stated in Halsbury's Laws of England, 3rd edition,by Lord Simonds, at page 105, the legal right to enforce the performance of a duty must be in the applicant himself and the Court will therefore only enforce the performance of statutory duties of public bodies on the application of a person who can show that he has himself a legal right to insist on such performance. In the present case, it may be conceded that the petitioners have got such personal right. Then there is the proviso (*b*) to section 45 of the Specific Relief Act, which is to the effect that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporate character. Proviso (*d*) states that the applicant should have no other specific and adequate legal remedy. The contention against the maintainability of this writ petition advanced by Mr. Rajah Ayyar was based on the principles formulated in the provisos (*b*) and (*d*) of section 45 of the Specific Relief Act.

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[1] A.I.R. 1953 Punjab 137. (Paragraphs 19 and 23).

[2] A.I.R. 1952 Cal. 496.

Before we examine the scope and the applicability of those provisos to the facts of the present case, it would be convenient to clear the ground on the question whether apart from the principles governing the issue of a writ of *mandamus* by the English Courts, that is to say,the principles formulated in section 45 of the Specific Relief Act the Court has got much wider powers under Article 226 of the Constitution, and whether if in fact this Court should possess such unlimited powers, it would exercise such powers without regard to the well-established principles governing the issue of such writs. In In re *Nagabhushana*[1], to which one of us was a party, an application was made for the issue of a writ of prohibition against the Election Sub-Committee of the All India Congress Committee, the Provincial Congress Committee and the District Committee, the Presidents of the Taluk and Town Congress Committees, etc., prohibiting them from holding Congress Primary Panchayat Elections and to issue directions to the various authorities to prepare the electoral rolls of the primary Congress members as per the rules of the constitution and circulars issued by the various authorities. In support of the application, the learned counsel relied on Article 226 of the Constitution as giving this Court power to issue the several directions which he sought in the petition. He stressed on the wide language employed in the article, and, in particular, referred to the words "to any person or authority" and "for the enforcement of any of the rights conferred by Part III and for any other purpose". As a result of the construction sought to be placed by the learned counsel, he was compelled to the logical result that the article would enable any person aggrieved to obtain any relief by an application under the Article. His Lordship the Chief Justice pointed out that on such construction, even a claim for money due on a promissory note could be enforced by means of writ under the said article, a result which would practically abrogate the entire judicial system and the machinery set up for the administration of justice. His Lordship the Chief Justice observed at page 1121:—

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[1] (1950) 2 M.L.J. 278 : I.L.R. (1950) Mad. 1119.

> "We do not think that Article 226 should be construed in this manner in spite of the wide language on which the counsel relied".

The case is also instructive as showing that the writ is available only against inferior Courts, tribunals and bodies entrusted by the law of the land with powers to affect the rights of parties, and not to a private organisation, however widespread and powerful it might be. It was observed at page 1122.

> "Nevertheless, in law, it cannot be held to be a public body entrusted by the law of the land with powers and duties relating to the rights of the people".

In *Indian Tobacco Corporation* v. *State of Madras*[1], a writ of *mandamus* was asked for against the State for preventing it from committing a breach of contract which the State threatened to commit. In that case also, the learned counsel repeated the contention that Article 226 of the Constitution was wide enough to apply to cases which would not fall within the scope of a prerogative writ of *mandamus* as understood in England ; and in repelling that contention His Lordship the Chief Justice observed at page 761 :

> "It is undoubtedly true that the extent of the power conferred on the High Courts under Article 226 is much larger than they ever possessed before. But we have no hesitation in holding that it is not unlimited power. In our opinion, the words to any person mean to any person to whom, according to well established principles, writs like those mentioned in the article would lie; and the words any other purpose must be read in the context in antithesis to the words for the enforcement of any of the rights conferred by Part III.

In this connection reference may also be made to *Kallmattam Thippaswami*, In re[2] where an application was made under Article 226 of the Constitution by a minor through his guardian for directions in the nature of a writ of *mandamus*, directing the respondents to forbear from cutting the trees standing on certain survey numbers and removing the timber. Their Lordships rejected the application and observed thus :—

> " In our opinion, Article 226 of the Constitution should not be construed so as to replace the ordinary remedies by way of a suit and application available to the litigant under the general law of the land. Directions in the nature of a writ of *mandamus* should not, in our opinion issue under this article except to a quashi-public body or officer which is, under an obligation statutory or otherwise to do or refrain from doing anything which is likely to interfere with the rights of persons. In this case, it is admitted that ordinarily the remedy of the petitioner would be by way of a suit and an application for injunction in the suit ".

In the decision in *Carlsbad M.V. Mfg. Co.* v. *H. M. Jagtiani*[3], Mitter, J., stated at page 318.

> "But once the origin and history of High Prerogative Writs are remembered, it is clear that the powers given to a High Court under Article 226 are to be exercised in accordance with the principles which governed the said writs. The power of the High Court to issue such a writ to any person can only mean the power to issue such a writ to any person to whom, according to well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words 'and for any other purpose' must mean, for any other purpose for which any of the writs mentioned would, according to well established principles, issue".

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[1] (1954) 1 M.L.J. 429: I.L.R. (1954) Mad. 754.

[2] (1951) 2 M.L.J. 171.

[3] A.I.R. 1952 Cal. 315.

Thus it seems to us to be clear that in spite of the apparently very wide language of Article 226 of the Constitution, we can issue a writ of prohibition or *mandamus* only in accordance with the welll-established principles and which are formulated in section 45 of the Specific Relief Act. Mr. M.K. Nambiar, the learned counsel for the petitioners, drew our attention to an observation by one of the learned Judges of the Calcutta High Court in a Special Bench reported in *Budge B. Municipality* v. *Mangru*[1]:

> "Thus the conditions appertaining to an application under section 45 of the Specific Relief Act would not be strictly applicable to an application under Article 226 of the Constitution. Under the said Article, this Court has *inter alia* power in appropriate cases to issue to any person or authority any directions or orders for any purposes. Thus, Article 226 has conferred almost unlimited power on the High Court to make suitable orders or to give suitable directions which it can exercise in appropriate cases. The present case is, in my opinion, an appropriate case where the jurisdiction conferred by Article 226 can be exercised".

In this connection, the following observation at page 144 in the decision in *Naubat Rai v. Union of India*[2], seems pertinent :—

> " In my opinion, the petitioner has not been able to bring his case within the principles under lying section 45 of the Specific Relief Act which are the principles which govern the issue of a writ of *mandamus* under Article 226".

We will now take up the proviso (*b*) to section 45 of the Specific Relief Act, whether under the terms of that proviso the petitioners can ask this Court for the issue of a writ of *mandamus*. According to that proviso, the doing or forbearing should be (1) under any law for the time being in force, clearly incumbent on such person or corporation or Court (2), on such person or Court in his or its public character or on such corporation in its corporate character. That is to say, there must be a legal or a statutory duty imposed on the person, corporation or Court, and the person or the Court should act in his or its public character and the corporation in its corporate character. It will be seen that the expression public character is tacked on to the person and Court, whereas corporate character to the corporation, for all corporations may not have a public character. In the first place, we will consider whether in this case there was any duty cast upon the first respondent-Company with reference to the petitioners under any law for the time being in force. As we stated, the dispute in this case centres on the managing agency rights conferred on the petitioners under the memorandum and the articles of association already referred to. Their learned counsel, Mr. Nambiar, drew our attention to some sections of the Companies Act, in particular sections 36 and 291. Section 36 provides that subject to the provisions of the Act, the memorandum, and the articles shall bind the Company and the members thereof to the same exent as if they respectively had been signed by the Company and by each member and contained covenants on its and his part to observe all the provisions of the memorandum and articles of association. This section makes the memorandum and the articles binding on the Company and the members thereof as if they had been signatories thereto. Section 291 of the Act defines the general powers of the Board of Directors, that is, to exercise all such powers and do all such acts and things as the Company is authorised to exercise and do: The first proviso to that section directs that the Board shall not exercised any power or do any act or thing which is directed or required, whether by the Act or the memorandum and the articles of the Company to be exercised or done by the Company in a general meeting and the second proviso directs that in exercising any such power or doing any such act, the Board shall be subject to the provisions contained in the Act and in the memorandum and articles of the Company that is to say, the Board of Directors shall exercise their powers and do acts only in conformity with the memorandum and the articles of association. It is therefore contended that in the present case, the agency rights which the petitioners claim and which are embodied in the memorandum and the articles of association are binding upon the company, and as such under the law for the time being in force, it is incumbent upon the Company to respect the rights of the petitioners within the meaning of clause (*b*) of section 45. No doubt, the memorandum forms the constitution of the Company, and the articles the rules regulating the conduct of the affairs of the Company,and as such, form part of the law so far as the

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[1] (1952) 57 C.W.N. 25 at page 61.

[2] A.I.R. 1953 Punj. 137.

Company is concerned. Nevertheless, those particular provisions in the memorandum and the articles of association were the result of a contractual arrangement entered into between the Company and the petitioner with reference to their managing agency rights, and it is only those contractual rights that are put into the memorandum and the articles of association. It therefore seems to us that it is only because of the contractual obligations, the Company would be bound to respect the rights of the petitioners and not because they are enjoined to do so by any law or statute for the time being in force within the meaning of proviso (*b*). We are of the opinion that the duty sought to be enforced by the petitioners in the present case, though embodied in the memorandum and the articles of the Company, cannot be placed on a higher footing than a contractual obligation, of which the articles and the memorandum are only the documented evidence. It has been held in a number of cases that a *mandamus* does not lie to enforce a contractual obligation (Vide *P. K. Banerjee* v. *L. J. Simonds*[1], and *Dubar Goala* v. *Union of India*[2]. In *Indian Tabacco Corporation* v. *State of Madras*[3] already referred to, at page 761, it was observed:—

> " We are clearly of opinion that the appellants are not entitled to a writ of *mandamus* to enforce their contractual rights".

It is therefore clear that the duty imposed on the person, corporation or Court must be a duty imposed by any statute or law for the time being in force, and we are of opinion that in the present case there is no such statutory duty imposed on the first defendant-Company to recognise the agency rights of the petitioners. An order of *mandamus* will be granted only for ordering that to be done which a statute or rule of law requires to be done, and not for the enforcement of contractual obligations.

It is also important to notice with reference to the proviso (*b*) of section 45 the person or Court against whom the writ is asked for must have functioned in his or its public character, or, if it were a corporation, in its corporate character, which appears to us necessarily to imply that that what the person, corporation or the Court does must be in the nature of a public duty. In Halsbury's Laws of England, Simonds edition, Volume 11 at page 84, this is what is stated :—

> "The order of *mandamus* is an order of a most extensive remedial nature, and is, in form, a command to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public Duty ".

Again at page 105, it is thus stated :—

> " The order is only granted to compel the performance of duties of a public nature. It will not accordingly, issue for a private purpose, that is to say, for the enforcement of a merely private right."

A Full Bench of the Patna High Court observed in *Surajmull* v. *Commr. of Income Tax*[4].

> " It is used principally for public purposes and to compel performance of public duties though it may also be used to enforce private rights when they are withheld by public officers".

In the present case, the petitioners' complaint is that the first respondent-Company, by its resolution of 7th April, 1956, refused to recognise the managing agency rights of the petitioners and declared that those rights had ceased to exist on and from 1st April, 1956 by reason of the new Act coming into force. The passing of that resolution was not in the nature of a public duty performed by the Company. It was a matter entirely between the Company on the one hand and the petitioners on the other in regard to certain private rights which the petitioners claimed. There was nothing in the nature of a public duty to be discharged by the Company.

No doubt, as contended by Mr. Nambiar, all corporations are in some respects, public. He relied on the following passage at page 498 in High Prerogative Writs Volume, I, by A.S. Chaudhri :—

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1. A.I.R. 1947 Cal. 307.
2. A.I.R. 1952 Cal. 496.
3. (1954) 1 M.L.J. 429 : I.L.R. (1954) Mad. 754.
4. A.I.R. 1930 Pat. 538. at p. 539 (F.B.).

> "All corporations are in some respect public; that is they derived their very existence and their franchise from the public and owe to the public the performance of certain duties, which the public functionaries may enforce. They are private in other respect, but with respect to the performance of duties which relate to the private management or operation of the corporate affairs or enterprise the officers occupy a position analogous to that of trustees, as respect the members of the Corporation and their duties as such may ordinarily be enforced by *mandamus*."

but that does not mean that whatever a corporation does, would be in the nature of a public duty. That would depend upon the circumstances in which the duties are performed. In fact, it is observed in the same book at page 499 :—

> "Such duties, so far as they relate to the public, are in fact public duties or duties which they owe to the public."

Here, what the Company did, did not relate to the public, now was it a duty which it owed to the public.

The cases on this point are numerous, but instructive. We have already referred to two Bench decisions of our High Court, namely, In Re *Nagabhushana*[1], and *Indian Tobacco Corporation* v. *State of Madras*[2]. In both the cases, a writ of *mandamus* was refused, under the earlier case, against the Congress party, and in the latter case, against the Government. In the latter case, what was sought to be enforced by means of a writ was contractual rights. We may also refer to another Bench decision of our High Court reported in *Ganapathy* v. *T. B. A. & P. Ltd*[3]. In that case, the Directors of a Company who were duly elected filed an application for a writ of *mandamus* for an order, directing the respondents who were the Company and its Managing Agents, to deliver to them all the records and documents and other properties in their possession. The *mandamus* was refused on the ground that the application would be barred both under provisos (*b*) and (*c*) of section 45 of the Specific Relief Act. It was observed :—

> "There can then be no question of their being directed to do or forbear from doing anything in their public character".

In that case, reference was made to In re *The Albert Mills Co. Ltd.* ; *Nasarvanji Aspandarji Mandji Homaji & Gokuldas Madaji* v. *Shivji Manikbhai*[4], a case referred to by Mr. Nambiar. In that Bombay case, it was held that the High Court had jurisdiction to enforce by *mandamus* the right of duly elected Directors by the Company to exercise the functions of Directors if such rights are interfered with by the Company acting through its other Directors. At page 444, we find the following observation :—

> "I am at a loss to see by what other remedy the right of such persons could be enforced, unless a writ of *mandamus* were grantable; and the absence of any other remedy has been always regarded as a strong ground for the Court to award such writ."

So, the Bombay case was explained in the Madras case on the ground that a *mandamus* was issued in the Bombay case against the Company as there was no other remedy. Decisions of other High Courts were brought to our notice such as *Carlsbad M. W. Mfg. Co.* v. *H. M. Jagtiani*[5], *Dubar Goala* v. *Union of India*[6], *Union of India* v. *Elbridge Watson*[7], *A. C. Gilbert* v. *Registrar H. C. Allahabad*[8], and *Naubat Rai* v. *Union of India*[9], to all of which, however, a detailed reference is not necessary.

Mr. Rajah Ayyar also drew our attention to some of the English cases : *The King* v. *The Governor and Company of the Bank of England*[10]. It was held that the Court would not grant a *mandamus* to a trading corporation at the instance of one of its members to compel them to produce their accounts for the purpose of declaring a divident of their profits. Abbot, C.J., observed :—

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[1] (1950) 2 M.L.J. 278 : I.L.R. (1950) Mad. 1119.

[2] (1954) 1 M.L.J. 429 : I.L.R. (1954) Mad. 754.

[3] (1953) 1 M.L.J. 484.

[4] 9 B.H. C.R. 438.

[5] A.I.R. 1952 Cal. 315.

[6] A.I.R. 1952 Cal. 496.

[7] A.I.R. 1952 Cal. 601.

[8] A.I.R. 1953 All. 678.

[9] A.I.R. 1953 Punj. 137.

[10] 106 E.R. 492.

> "A mere trading corporation differs materially from those which are entrusted with the Government of cities and towns and therefore have important public duties to perform. No instance has been cited in which the Court has granted a *mandamus* to a corporation like the present, and I think we ought not now to establish the precedent".

Bayley, J., Observed :—

> "The Court never grant this writ except for public purposes and to compel the performance of public duties ; this is an application at the instance of one of several partners in a trading company to compel his co-partners to divide their profits; but that is a mere private purpose and presents a fit subject for enquiry on the other side of the Hall. There is no instance in which the Courts have granted a *mandamus* to a trading corporation ; and that being so, I think that we should not now grant it for the first time".

The above observations are significant and show that ordinarily a writ of *mandamus* cannot issue to a private trading corporation like the present one unless it acts or fails to act in the discharge of a public duty, and so for as the rights claimed by the present petitioners are concerned, we are unable to see how the first respondent-Company owed a public duty which it failed to discharge. In *The King* v. *The London Assurance Co.*[1], an application was made to the Court for a *mandamus* to the defendant-Company requiring them to permit a transfer in the capital stock of the Corporation. The Company refused to permit a regular transfer of the shares in to the names of the assignees to be made. The Court held :—

> "We are not aware of any instance of a *mandamus* like the present having ever been granted, and if we were to grant this we should be called upon to interfere in all cases of dispute between the members of private corporations. This Company, although carried on under a royal charter, is a mere private partnership. But the writ of *mandamus* is a high prerogative writ, and is confined to *cases of a public nature*. The rule, therefore, must be refused."

In *Ex parte Briggs*[2], it was held that an applicant for a *mandamus* to allow him to inspect and take copies from the parish accounts must show some tangible public ground for the application and that he cannot rest it upon his mere private right, as an individual, to inspect. Erle, J., held that a parishioner's right to inspect the parish rate-books is a mere private right and that, therefore, in order to entitle him to a *mandamus* to inspect, he must show, besides his private right some grounds of a public nature. Having regard to these decisions and to facts of the present case, it seems to us that there are no grounds of a public nature involved in this case and that in denying the petitioner's right as managing agents, there is no question of any public duty involved, the matter being purely a private right between the petitioners on the one hand and the Company on the other based upon contractual relations which are incorporated in the memorandum and the article of association. In this connection, it will be relevant to note that Chapter VIII of the Specific Relief Act bears the heading " Of the Enforcement of Public Duties ", which gives an indication of the intention of the Legislature that unless something was done or forborne in the discharge of a public duty either by the person or the Court in his or its public character or a corporation in its corporate character, it will not be appropriate to issue any order or direction in the nature of a *mandamus* under that section. As to the value of headings in interpreting statutes, reference may be made to *Eastern Counties & Companies* v. *Marriage*[3]. Vide also *Calcutta Corporation* v. *Sub-Postmaster Dharamtola*[4]. In this connection, we may also refer to another English decision in *The Queen* v. *The Government Stock Investment Co.*[5] In that case, two vacancies arose amongst the Directors of a Company, and there were four candidates, of whom the prosecutor was one. At the meeting for election, a show of hands was taken when the prosecutor obtained the largest number of votes. A poll was then demanded by the Deputy Chairman who was the holder of 20 shares only, but who held proxies for more than 2000 shares. At the poll, the prosecutor was not elected. He now claimed to have been elected by the show of hands on the ground that the poll was illegally demanded as the holder of proxies was not, by virtue of them, entitled to demand a poll. Their Lordships made the rule absolute for *mandamus* against the defendant company to admit the prosecutor as a Director of the Company. But the question whether it was a fit case

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1. 106 E.R. 1420.
2. 120 E.R. 1141.
3. (1860) L.R. 9 H.L. Cas. 32.
4. A.I.R. 1950 Cal. 417.
5. (1878) L.R. 3 Q.B.D. 442.

for the issue of a mandamus was not considered at all. The case was decided only on the ground that the poll was illegally demanded.

We next proceed to consider proviso (*d*) to section 45 of the Specific Relief Act. According to that proviso, the applicant shall have no other specific and adequate legal remedy. In Halsbury's Laws of England, Vol. 11, 3rd edition, it is stated the purpose of mandamus is to supply defects of justice, and accordingly it will issue to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet, that mode of redress is less convenient, beneficial and effectual. The same proposition is stated at page 107 of the same book as follows :—

> "The Court will, as a general rule and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective".

At page 108, it is stated :—

> "The Court will not interfere to enforce the law of the land by the extraordinary remedy of an order of mandamus in cases where an action at law will lie for complete satisfaction".

At the same time, it is pointed out at page 109 :

> "Apparently, the fact that an action for a mandamus will lie does not necessarily exclude the remedy by order of mandamus ".

These propositions appear to be so well-established that we are indeed reluctant to refer to all the decisions, to which our attention was drawn during the course of the arguments. We may, however, refer to a passage at page 1122 of the decision in In Re *Nagabhushana*[1], which is to the following effect :—

> "In our opinion, the general rule applied to the case of writs like *mandamus*, prohibition and *certiorari*, namely, that these writs will not issue if there is another adequate remedy, should apply to the issue of a direction, order or writ under Article 226 (1) in spite of the apparently wide language employed. In this case, the petitioners could well have filed a suit and obtained immediately an urgent order of injunction and thus obtained the same reliefs which they seek from this Court".

Reference may also be made to *In the Matter of the Bombay Fire Insurance Co., Ltd. Ex Parte R. Gilbert*[2], where an application under section 45 was refused, seeking for directions against the Directors of a company for registration as a shareholder in respect of shares purchased by the applicant on the ground that section 58 of the then Companies Act afforded the applicant a remedy, adequate and appropriate, and recourse cannot therefore be had to the Chapter of the Enforcement of the Public Duties. As stated in Halsbury's Laws of England, the fact that an action for mandamus will lie does not necessarily exclude the remedy by order of mandamus and it may issue in cases where, although there is an alternative legal remedy, yet, that mode of redress is less convenient, beneficial and effectual. As an instance, reference may be made to a recent decision of a Bench of our Court reported in *Subramania Chettiar* v. *R. D. O., Devakotah*[3]. Their Lordships observed at page 131:

> " Normally, it will not issue a writ where there is an alternative remedy. But it is well settled now, by decisions of the Supreme Court and the High Courts, that there is no absolute bar to entertaining writ petitions and issuing a writ, even when there are alternative remedies, when these alternative remedies are, in the opinion of the Court, not effective, speedy, adequate or sufficient, and the facts of each case have to be considered before deciding whether the alternative remedies are speedy, effective, sufficient, or adequate ".

The question in the present case therefore is whether the normal remedy of a suit is not available to the petitioners, as an adequate remedy. As stated already, the object of the present writ is to direct the respondents to forbear from enforcing in any manner the resolution passed by respondents 2 to 9 on 7th April, 1956. It is for the petitioners to satisfy the Court that they cannot get that remedy in a regular action for mandamus. Ordinarily, it must be held that such an action would lie. But their learned counsel, Mr. Nambiar, contended that in the circumstances of the present case, a suit for that specific remedy will not be maintainable, and in support of his contention, he relied on the following decisions : *Mothey Krishna Rao* v. *Anjaneyulu*[1]; *Ram Kumar Potdar* v. *Sholapur Spinning & Weaving Co., Ltd.*[2]; *Boultion Bros.* v. *New Victoria Mills*[3] ; *Gulab Singh* v. *Punjab Zamindara Bank, Ltd.*[4]; *Ramachandra* v. *Chinubhai*[5]. In the Madras case *Mothey Krishna Rao* v. *Anjaneyulu*[1], the plaintiff filed a suit for a declaration that he was the secretary and treasurer of Krishna Jute Mills, Ltd., Eluru, against four defendants who were the Directors of the Company and who adopted a resolution for removing the plaintiff from the post of secretaryship. The claim was based upon the memorandum and the articles, as in the present case. It was held that the plaintiff had no cause of action against the company on the basis of the articles, because it was pointed out that under section 21 of the Indian Companies Act, not only a third party, but even a shareholder cannot sue the company on anything contained in the articles, treating them as a contract by the company with him. That was the main ground on which the plaintiff was non-suited ; that is to say, he had no cause of action against the Company on the basis of the articles, though we are not sure whether that would be the position even under the new section 36. Even so, it would not be a case where the plaintiff had a regular right but without a legal remedy. That would be a case where he had no legal right at all, and if he had no cause of action for an action for mandamus, clearly he cannot ask for a writ of *mandamus*. In that case, when the appeal was argued in this Court, permission was granted to amend the plaint for the following consequential relief, namely, an injunction restraining the defendants from interfering with the plaintiff's exercise of powers and duties as secretary and treasurer. But, then, it was held that the declaration sought by the plaintiff with the consequential relief would really tantamount to specific performance of a contract of personal service, and therefore hit by section 21 (*b*) of the Specific Relief Act. The Bombay case, *Ram Kumar Potdar* v. *Sholapur Spinning & Weaving Co., Ltd.*,[2] was a suit by the shareholders of a company for a declaration that certain resolutions passed by the Directors were *ultra vires* and for an injunction restraining the Company from carrying out the said resolutions, the resolutions being that the agreement for the employment of certain persons as managing agents of the Company be determined. It was observed in that case that no Court will make an order or grant an injunction, the effect of which will be to compel specific performance of a contract of personal service. It is therefore contended that in the present case, if a suit were to be filed against the respondents to direct them to forbear from enforcing in any manner the resolutions passed by them on 7th April, 1956, which is the same thing as restraining the Company and its Directors from carrying out the said resolutions, as was the prayer in the Bombay case, then, such an order or direction would in effect enforce a contract of personal service, the managing agency being such service. In the Law of Specific Relief by Agarwala, 1951 edition, at page 450, it is pointed out that the services of managing agent of a company involved doing of acts which involved personal discretion, personal qualifications and confidence, citing as authority the decision in *Ramachandra* v. *Chinubhai*[5]. But then, the question is whether, if an injunction which in effect would amount to specific performance of a contract of personal service cannot be granted in an action for mandamus on the ground that such a contract is dependent on personal qualifications or volition of the parties as contemplated in section 21 (*b*) of the Specific Relief Act, a writ of *mandamus* can issue to effectuate the very same purpose. It is our firm opinion that if a person cannot get a particular relief he cannot certainly get over that difficulty by asking for a writ of *mandamus* and thereby obtain that very relief which he would not be entitled to under the common law. The object of mandamus is not to give a party what he is not entitled to under the law. The object is to supply defects of justice, and that justice may be

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[1] (1950) 2 M.L.J. 278 : I.L.R. (1950) Mad. 1119.

[2] (1892) I.L.R. 16 Bom. 398.

[3] (1956) 2 M.L.J. 126.

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1. (1953) 1 M.L.J. 781.
2. (1934) I.L.R. 59 Bom. 218.
3. A.I.R. 1929 All. 87.
4. A.I.R. 1940 Lah. 243.
5. A.I.R. 1944 Bom. 76.

done where there is a legal right but no specific legal remedy for enforcing that right. If in respect of a right there is no particular remedy, such as injunction or specific performance, the absence of such remedy could not be rectified and a remedy created where none exists. For instance, if a right in respect of which there is a legal remedy in the sense that it can normally be enforced in an action, happens to be barred by the law of limitation, it cannot be stated that the party claiming that right has no remedy and therefore he can ask for a prerogative writ of mandamus to get over the bar of limitation. In the present case nothing would prevent the petitioners from filing a regular suit in a civil Court for a declaration that the resolution of 7th April, 1956, was invalid and inoperative and for consequental reliefs such as injunction restraining the Company from enforcing that resolution. It is true that there is no guarantee that such a suit would succeed. It might fail for want of proof or merits, or on the ground of limitation, or from some other defect. It cannot be stated that the right which the petitioners claim is one which has no legal remedy and therefore a writ of *mandamus* should issue. In fact, there is clause (*h*) to section 45 itself to the effect that nothing in that section shall be deemed to authorise any High Court to make any order which is otherwise expressly excluded by any law for the time being in force.

Further, a right may carry with it more than one remedy, so that a person whose right is invaded may sue for remedies such as (1) specific performance, (2) injunction, and (3) damages. He may not succeed in getting the reliefs of specific performance and injunction. That does not mean that he has no remedy for his right. He has still the remedy of damages—such damages as would afford complete satisfaction. In the present case, even if the petitioners may not get the other reliefs such as specific performance or injunction, they may well seek satisfaction in damages. Their right is not a right of such character as cannot be compensated by money. But Mr. Nambiar contended that the remedy must be more or less of the same character, if not identical with the one asked for under the writ, and that when he asked for specific performance or injunction, he cannot be told that damages would be adequate compensation. In support of his contention he relied on a passage at page 369 of High Prerogative Writs by A. S. Chaudhari, Volume 1 which is to this effect :—

> " Ordinarily, the remedy must be such as will enforce the right or compel the performance of the particular duty in question, in effect, specific performance, and not merely a remedy which in the end saves the party to whom the duty is owned unharmed by its non-performance ".

We fail to see how that observation supports the contention. What is important is that the remedy must be such as will enforce the right. The enforcement of the right may be in the form of various remedies. The question is whether the remedy that would be available will not be proper and adequate. The petitioners' rights are only the rights of managing agents with some remuneration attached to it. We fail to see why, even if they should fail to obtain specific performance or injunction, they should not be satisfied with adequate compensation in money.

Mr. Nambiar, the learned counsel for the petitioners, did not allow the matter to rest there. He further contended that even if it should be considered that the normal remedies available to the petitioners would be adequate, the circumstances of the present case would warrant the issue of a writ, because there are certain well-recognised exceptions to that rule. In support of his contention, he relied on a recent decision of the Bombay High Court in *S. C. Prasher* v. *Vasantsen Dwarkadas*[1], where a writ of *mandamus* was asked for against the Income-tax Officer, restraining him from proceeding further, pursuant to a notice under section 34 of the Income-tax Act. It was held in that case that the notice issued by the Income-tax Officer and challenged in the writ petition was a notice that was issued out of time and therefore invalid. In the circumstances of that case, the learned Judges found it difficult to accept the contention that a suit would be an adequate remedy, because a notice would have to be given under section 80, Civil Procedure Code and a suit usually resulted in dilatory proceedings. The learned Judges then proceeded to consider the exceptions to the ordinary rule that the Court will not give relief by means of a writ when the petitioner can get the same relief by ordinary legal remedies available to him. They formulated the following exceptions : (1) if the threat involves an encroachment upon the fundamental right of the petitioner, the Court will interfere and will not compel him to exhaust his legal remedies ; (2) if the authority against whom a complaint is made has violated rules of natural justice, the Court will interfere and protect the petitioner and not insist upon his going to a higher tribunal for relief; (3) when there is a complete absence of jurisdiction and such absence of jurisdiction is apparent on the face of the record, that in the case of administrative officer or tribunal, meaning without authority or beyond his competence. In *Himmatlal* v. *State of M. P.*[1], the applicant-company, fearing that it might be subjected to the payment of sales tax without authority of law, preferred to the High Court an application for writ for protection from the impugned Act and its enforcement by the State. It was held that the State evinced an intention to apply the penal provisions of the Act against the applicant-company if it failed to make the return or to meet the demand, and in order to escape from such serious consequences threatened without authority of law and infringing fundamental rights, relief by way of a writ of *mandamus* was clearly the appropriate relief. Their Lordships pointed out that a threat by the State by using the coercive machinery of the impugned Act to realise from the applicant is a sufficient infringement of his fundamental rights under Article 19 (1) (*g*) and it was clearly entitled to relief under Article 226 of the Constitution. It was further pointed out that in that case, the remedy provided by the Act was of a onerous and burdensome character, because, before the applicant Company could avail itself of the remedy, it had to deposit the whole amount of the tax, and such a provision could hardly be described as an adequate alternative remedy. In other words, their Lordships of the Supreme Court recognised that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the Court with an allegation that his fundamental right had been infringed and sought relief under Article 226. But the question is whether that exception is applicable to the present case, and for deciding that question it will be necessary for the petitioners to establish that in the present case there has been a violation of their fundamental rights. No doubt, to acquire, hold and dispose of property is a fundamental right guaranteed under Article 19 (1) (*f*) of the Constitution, and the contention of Mr. Nambiar was that the managing agency rights claimed by the petitioners was such right. He maintained that the petitioners according to the Memorandum of Association had hereditary rights and therefore their rights were analogous to the rights of hereditary trustees of temples or mutts or other religious institutions. In support of his contention, he cited two decisions: *Narayanan Nambudripad* v. *The State of Madras*[2], and *Commr., H. R. E.* v. *L. T. Swamiar*[3]. In the Madras case, the incidents of hereditary trusteeship were discussed and the conclusion reached was that there was ample authority for tne view that trusteeship where hereditary is in the nature of property. Their Lordships observed :—

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[1] A.I.R. 1956 Bom. 530.

> " We are accordingly of opinion that hereditary trusteeship is within the protection afforded by Article 19 (1) (*f*), even though there was no emoluments attached to the office".

In the other case, in discussing the rights of a mahant, their Lordships of the Supreme Court, at page 288 made this observation:—

> " There is no reason why the word 'property' as used in Article 19 (1) (*f*) of the Constitution should not be given a liberalland wide connotation and should not be extended to those well-recognised types of interest which have the insignia or characteristics of proprietary right. As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office."

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[1] A.I.R. 1954 S.C. 403.

[2] (1953) 2 M.L.J. 699.

[3] 1954 S.C.J. 335 : (1954) 1 M.L.J. 596: (1954) S.C.R. 1005: A.I.R. 1954 S.C 282 (S.C.).

But we fail to see what analogy there can be, and how any comparison can be made, between hereditary trusteeship and managing agency. The managing agency, though it may be called hereditary, is a right arising out of contractual relationship of a contract of personal service as was held in the cases already cited. The fact that it was to be a hereditary managing agency may have a bearing on the duration of the right and would not alter its nature or characteristics. It cannot possibly be contended that the office of agency can be called property within the meaning of Article 19 (1) (*f*) of the Constitution. The right of hereditary managing agency conferred under the Memorandum and the Article of the Company was a result of an arrangement entered into between the petitioners' firm and the other firm on the one hand and the Company on the other. We are also unable to understand what the hereditary managing agency would mean with reference to a firm. Such hereditary rights were not conferred on the firm even as a joint family firm. On the other hand, clause (6) of the Memorandum shows that the right shall be hereditarily vested in the said firms and their heirs, executors or administrators and in the said firm as from time to time constituted; that is to say, it contemplates even strangers, and not necessarily members of the joint family, becoming members of the firm. Let us, however, assume that the rights claimed by the petitioners are in the nature of property within the meaning of Article 19 (1) (*f*) of the Constitution. Even so, the question is whether the writ prayed for should issue against the respondent-Company and its directors. It is true that even in a case where the violation of fundamental rights related to property, a writ of *mandamus* was issued by the Supreme Court in *State of Rajasthan* v. *Nath Mal*[1]. But it will be seen that in all those cases, the infringement of fundamental rights was by the State and the writ issued against the State even though the remedy at law was available. Mr. Nambiar has not been able to cite any decision in which a writ was issued for violation of rights to property by individuals or companies. On the other hand, in *Shamdasani* v. *Central Bank of India, Ltd.*[2], a petition was filed to the Supreme Court under Article 32 of the Constitution for the enforcement of the petitioner's fundamental rights under Article 19 (1) (*f*) and Article 31 (1) alleged to have been violated by the Central Bank of India, Ltd. The petitioners held five shares in the share capital of the Bank which sold those shares to a third party in exercise of its right of a lien for recovery of a debt due from the petitioner. Their Lordships held that the petition must fail on a preliminary ground. They pointed out that neither Article 19 (1) (*f*) nor Article 31 (1), on its true construction, was intended to prevent wrongful individual acts or to provide protection against merely private conduct and that the language and structure of Article 19 and its setting in Part III of the Constitution showed that the Article was intended to protect those freedoms against the State action and that the violation of rights of property by individuals was not within the purview of the Article. They further pointed out that similarly the words save by authority of law in clause (1) of Article 31 showed that it was a prohibition of unauthorised governmental action against private property. According to their Lordships, it was a fundamental misconception that Article 19 (1) (*f*) and Article 31 (1), which are great constitutional safeguards against State aggression on private property, are directed against infringement by private individual for which remedies should be sought in the ordinary law". It follows that the attempt of Mr. Nambiar to bring this case within the terms of the first exception must fail.

Mr. Nambiar then endeavoured to bring his case within the third of the exceptions stated above, namely, complete absence of jurisdiction apparent on the face of the record. He contended that the Directors, namely, respondents 2 to 9 had no power to remove the petitioners as Managing Agents, because, under Article 136, the Secretaries and Bankers shall not be removed from office otherwise than by their own resignation or except on fraud being established. There were no such grounds in the present case. The learned counsel therefore contended that so long as the Memorandum and the Articles of Association remained unamended, there was no power vested in the Directors to terminate the services of the Managing Agents. But it will be seen that by their resolution of 7th April, 1956, they did nothing of that kind. They merely recorded their opinion, supposed to be based upon the opinion of their legal experts, that with the coming into force of the Indian Companies Act, 1956, the Secretaries and the bankers of the Company had ceased to be entitled to the office and accordingly, the said office had become vacant by operation of the law as and from 1st April, 1956. Even otherwise, it cannot be stated that the want of authority was apparent on the face of the record. That would depend upon the soundness of the legal opinion on which that resolution was based. Then it was contended that notwithstanding the arrangement of March, 1954, Kalairaja Chettiar, though he ceased to be the Local Agent, nevertheless, continued as *ex-officio* Director of the Company, and for the Directors' meeting of 7th April, 1956, no notice was issued to him and that therefore the resolution of that date was wholly invalid. In Halsbury's Laws of England, 3rd edition, Volume VI, at page 315, we find the following statement of the law :—

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[1] (1954) S.C.J. 404 : (1954) S.C.R. 982 : A.I.R. 1954 S.C. 307 (S.C.).

[2] (1952) S.C.J. 29 : (1952) 1 M.L.J. 423 : (1952) S.C.R. 391 (S.C.).

> " A meeting of Directors is not duly convened unless due notice has been given to all the Directors, and the business put through at a meeting not duly convened is invalid".

But in this case, the respondents dispute the fact that Kalairaja Chettiar continued to be the Director on 7th April, 1956. For, their contention is that by reason of his continuous absence from the meetings, he forfeited his right as a Director. That is a question of fact which we cannot go into in this petition. Their contention also was that by two resolutions of the Board of Directors in May-June, 1954, it was decided that the Directors' meeting should be held on the first Saturday of every month at 10-30 A.M., and that those resolutions were duly served on Kalairaja Chettiar,—a fact which Mr. Nambiar was not prepared to controvert. But he contended that any such intimation of meeting for all times would not be in conformity with the requirements of section 286 of the Companies Act. But that section does not prescribe the form of the notice or the mode of its service, and if the Directors are duly informed that in future the meetings would be held on the first Saturday of every month, we fail to see why it should not be a sufficient compliance of the Statute.

In our opinion, therefore, the circumstances of this case do not call for the issue of a writ of *mandamus* or any other writ or direction, and we accordingly dismiss this petition with costs (Separate sets).

Counsel fee Rs. 500.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. J STICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

P. M. Muthuraman Chettiar and another .. *Applicants**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922), *section* 10—*Assessee's loss in one business—When could be set off against the profits in another—Assessee doing business in his individual capacity and in partnership—Income of partnership—If covered by ' business'.*

Where an assessee carries on business as an individual and is also a partner in another business the share loss sustained by him as a partner could be set off against his profits from the individual business as well as his share income from other partnerships which return a profit. It does not make any difference that some of the firms, of which the assessee is a partner, are non-resident. Under the Indian Income-tax Act what is brought to charge is the total world income of the assessee. If the profits of an assessee in respect of his foreign business could be brought within the scheme of taxation under the head of ' business' it would follow that the loss sustained by him in such business could be set off against any income under the same head. Under the scheme of the Act the share income of a partner in a firm is brought to charge under the head ' business ' falling within section 10 of the Act.

Mohanlal Hiralal v. *Commissioner of Income Tax, C. P. and Berar, Nagpur,* (1952) 22 I.T.R. 448, followed.

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* C.R. Nos. 66 and 80 of 1953. 9th October, 1956.

Cases referred to the High Court by the Income-tax Appellate Tribunal (Act XI of 1922) as amended by section 92 of the Income-tax Amendment) Act, 1939 (VII of 1939), in R.A. No. 1168 of 1952-53, I.T.A. No. 6302 of 1951-52 Assessment year 1946-47 and R. A. No. 642 of 1950-51, I.T.A. No. 2761 of 1948-49 Assessment year 1947-48, respectively.

T. V. Viswanatha Ayyar, S. Narayanaswami for Applicant in Case Referred No. 66 of 1953.

K. Srinivasan for Applicant in Case Referred No. 80 of 1953.

C. S. Rama Rao Sahib for Respondent in both the cases.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—Case Referred No. 66 of 1953. The question referred to this Court for determination under section 66 (1) of the Indian Income-tax Act is whether the loss of Rs. 23, 672 incurred by the assessee as a partner of the three firms outside India could be set off against the assessee's income from business in India having regard to the provisions of the Indian Income-tax Act on this behalf?

The assessee is an undivided Hindu family consisting of a father and his minor son. The managing member of this family was carrying on business as money-lender and a dealer in shares in British India. He was also a partner in three non-resident firms carrying on business at Penang, Kauntan and Raub.

Having regard to the residence of the manager in the year of assessment, with which this reference is concerned, namely, 1946-47, the assessee (undivided Hindu family) was treated as resident and ordinarily resident.

In the course of the assessment proceedings of this assessee it claimed that it had incurred a loss of Rs. 23,672 in the three foreign businesses in which the assessee was a partner and claimed a set off of this sum against its income from its money-lending business in British India. The Income-tax Officer negatived the claim to the set off, and this order was confirmed by the Appellate Assistant Commissioner and by the Tribunal on appeals by the Assessee.

The reasoning on which this claim was disallowed by the Tribunal was, that though, when an assessee carries on more business than one and sustains loss in one of them, the same could be set off against the income from other businesses under section 10, that principle was inapplicable where the business carried on by the assessee was one in partnership with others. To such a case the Tribunal held that section 10 would not apply, and the right to set off could arise only under section 24, and that as none of the sub-sections was attracted to the present case, the assessee was not entitled to the relief claimed. The question for our consideration is whether this view is correct.

We have had occasion to consider in *Parasram Jethanand* v. *Commissioner of Income-tax*[1], a closely allied question: Whether where an individual carried on business in the taxable territories as well as outside, the loss incurred by him outside the taxable territories could be set off against income from business in the taxable territories in computing the total income profits or gains for the purpose of assessment to tax. We held that the assessee was so entitled. After referring to the relevant provisions we pointed out :—

> "Under section 10 (1)......The tax is payable by the assessee 'in respect of the profits or gains of any business, profession or vocation carried on by him'.. It is clear that if one paused here and analysed the concept of income from business, the assessable income cannot be computed without making an allowance for the loss incurred in that business. It is the profit earned by an assessee during the entirety of the accounting year from business that is the subject-matter of taxation under section 3 read with section 6 (4) and 10 (1) and not that in respect of each individual transaction which results in profits a separate computation is made with an independent tax liability. If, therefore, some of these transactions result in a profit and others result in a loss, all within the accounting year, it is the net result that has to be ascertained to find out whether the assessee had earned profits

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[1] (1955) 29 I.T.R. 818.

> under the head business, and if so how much. It will also be seen that the geographical location of the business in any particular place would not make any difference, so long as there is a unity ownership and control. The income or profits from every business carried on in any place is totalled up for the purpose of arriving at the income, profits or gains from the head ' business ' under sections 6 and 10. Just as there is no distinction between different branches of a business carried on in the taxable territory and between them or any of them and the head office, there is no distinction between the branches of the same assessee located outside the taxable territory. Such income which accrues is still income under the head 'business ' and it is the totality of the operations and transactions taking place in every place where the assessee carried on his business that yields the income for the purpose of computation under section 10."

We there pointed out that section 24 (1), which permits a set off of loss incurred under one head mentioned in section 6 against the income or profits under other heads in the same year, does not apply to the case of such an assessee. So far there is no dispute.

The point however that was urged by learned counsel for the department was, that in the present case there was no identity between the unit which derived the income and the units which sustained the loss, and therefore there was no possibility of set off under section 10 which permits the loss incurred by the same unit being set off against the profit derived by it, as was done *Parasram's case*[1]. In support of this position Mr. Rama Rao Saheb referred us to the terms of section 3, which specified the units which were the subject of assessment as

> " indivudual, Hindu undivided family, company and local authority and of every firm and other association of persons or the partners of the firm or the members of the association individually."

From this he drew the inference, that a firm as a unit of assessment was entirely distinct from the partners composing it who might themselves be units of assessment in their individual capacity. Based on this he urged that, when an individual or a Hindu undivided family was a partner in a firm, the unit of assessment in regard to the firm's profits or gains is the firm itself, which is a separate entity distinct from the partners composing it, notwithstanding that for the purpose of computing the total income of an individual his share of the profits from the firm is included in his total income. In this connection he relied on the observations of the Supreme Court in *Commissioner of Income-tax, West Bengal* v. *A. W. Figgies and Company*[2]. The case itself was concerned with the proper interpretation of section 25 (4) in relation to a firm which underwent several changes in its constitution. Learned counsel however relied upon the following observations of Mahanjan, J :—

> " It is true that under the law of partnership a firm has no legal existence apart from its partner and it is merely a compendious name to describe its partners but it is also equally true that that under that law there is no dissolution of the firm by the mere incoming or outgoing of partners. .But under the Income-tax Act the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually ".

After referring to section 3 of the Act his Lordship proceeded :

> " The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit foi purposes of assessment. Sections 26, 48 and 55 of the Act fully bear out this position ".

In our opinion, though learned counsel for the department is right in his submission, that the Income-tax Act regards a firm as a unit of assessment this by itself cannot lead to the result which he desires to achieve. If a person who is resident carries on business as an individual and is also a partner in a business carried on in the taxable tertitory (whether this firm is registered or unregistered does not for the present purpose make any difference) it is not disputed that the share-loss sustained by him as a partner could be set off against his profits from his individual business as well as his share-income from partnership which return a profit. If this were so where all the firms concerned are ordinarily resident, does it make any difference that some of these firms are non-resident, and the income of the

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1. (1956) 2 M.L.J. 119 : 29 I.T.R. 818. (1953) 24 I.T.R. 405 (S.C.).
2. (1953) S.C.J. 635 : 1954 S.C.R. 171 :

firm as such cannot be brought to charge under the provisions of the Income-tax Act :

Learned counsel for the Commissioner urged that it did and referred us to certain provisions of the Income-tax Act to which we shall immediately advert. Under section 14 (2)

> " the tax shall not be payable by an assessee
>
> (*a*) if a partner of an unregistered firm in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in clause (*b*) of sub-section (1) of section 16 on which the tax has already been paid by the firm " ;

Section 16 (1) (*b*) runs thus :

> " 16. (1) In computing the total income of an assessee
>
> * * * * * * * * * * * *
>
> (*b*) when the assessee is a partner of a firm, then whether the firm has made a profit or a loss, his share (whether a net profit or a net loss) shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year :
>
> Provided that if his share so computed is a loss, such loss may be set-off or carried forward and set-off in accordance with the provisions of section 24 ".

Section 23 (5) runs thus :

> " (5) Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be,
>
> (*a*) in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment, shall be determined :
>
> Provided that if such share of any partner is a loss it shall be set-off against his other income or carried forward and set-off in accordance with the provisions of section 24 :
>
> Provided further that when any such partner is a person not resident in the taxable territories his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally and the sum so determined as payable shall be paid by the firm :
>
> Provided also that if at the time of assessment of any partner of a registered firm, the Income-tax Officer is of opinion that the partner is residing in Pakistan, the partner's share of the income, profits and gains of the firm shall be assessed on the firm in the manner laid down in the preceding proviso and the sum so determined as payable shall be paid by the firm ; and
>
> (*b*) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (*a*) as applicable to a registered firm, if in his opinion the aggregate amount of the tax including super-tax if any payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm ".

In our opinion these provisions do not assist learned counsel for the department in sustaining his contention. Taking for instance, section 23 (5), it will be seen, that it applies only to a case where the assessment is against the firm as such. The fact that there can be an assessment of a firm as such and also against a partner of a firm in regard to his share income does not throw any right on the character of the income derived by the assessee as a partner in a firm. No doubt when there has been an assessment of a firm and tax has been collected from that entity in the case of unregistered firms, the individual partner who is in receipt of that income is not again made to pay tax on his share of the profits (14 (2) (*a*)). Section 16 (1) (*c*) does not militate against the construction which learned counsel for the assessee invites us to adopt.

Mr. Rama Rao Saheb further urged that the department had an option to assess either the firm or the individual and that it could not be compelled to assess the individual, and that unless the individual was assessed, his share of the loss could not be determined. In the present case, the firms themselves being non-residents and not being in receipt of taxable income have not been assessed under the Indian

Income-tax Act ; there was no question of assessing the firms. It was further suggested that the departmental authorities were not desirous of assessing the individual either in regard to his share from these firms, with the resultant position that the share of the loss could not be taken into computation in determining the total income of the assessee. We are unable to accept this reasoning as leading to the inference, that the departmental authorities are entitled to ignore the loss sustained by the assessee in his foreign businesses. Under the Indian Income-tax Act what is brought to charge is the total world income of every assessee. It is not denied that if instead of a loss, the business had yielded a profit, the share income of the assessee would have to be included in the computation of the total income of the assessee. If the income thus included is brought to charge under the head "business", that is a business carried on by the assessee, though in conjunction with others, it would follow that the loss sustained by him in such business could be set-off against income under the same head in computing the total income from businesses within section 10 of the Act.

In our opinion, therefore, the question really turns on whether or not under the scheme of the Income-tax Act the share income of a partner in a firm is brought to charge under the head " business " falling within section 10. If the answer is in the affirmative, the income derived by the assessee under the head " business " would be the profits or gains, less the losses incurred in the business carried on by the assessee in the several places. Realising the importance of this approach, Mr. Rama Rao Saheb contended that the share-income which a partner derived from a business was not "income from business" within section 10 but was " profit " from other sources falling within section 12. On this basis he urged that the share income fell under head (v) of section 6, while the income derived by the unit and by its sole exertion in the way of business fell under head (iv), and that consequently unless the case fell within section 24 there could not be a set-off. We are clearly of the opinion that learned counsel for the assessee is well founded in his argument, that the share income of a partner is income from business within section 10. In this connection learned counsel for the assessee invited our attention to a passage in the judgment of Chagla, C.J., in *Shantikumar Narottam Morarji* v. *Commissioner of Income-tax, Bombay City*[1], which occurs at page 76, where the learned Chief Justice said :

> "......the first question that we have to consider is whether section 10 has any application to the case of an assessee who is a partner of a registered firm. Mr. Joshi's contention is that section 10 has no application at all because section 10 deals with the profits of a business carried on by the assessee and according to Mr. Joshi the business in this case is not carried on by the assessee but is carried on by the assessee along with a partner or partners. Mr. Joshi says that a firm under the Indian Income-tax Act is an assessable entity and therefore a distinction must be made between a business carried on by a firm and a business carried on by an individual. Although a firm is an assessable entity under the Indian Income-tax Act a firm is not a legal entity. In the eye of the law a firm is a compendious expression used to indicate that several persons constituting that firm are carrying on a business. But that compendious expression cannot give to the firm a legal entity or a legal existence.
>
> In law it is only the partners who exist and who carry on the business.... Therefore the contention that section 10 (1) cannot apply to a partner in a registered firm is untenable because he does carry on the business although that business happens to be a partnership business and therefore if any profits and gains are derived by the assessee from the business carried on by him, those profits and gains must be brought to tax only under this head, *viz.*, the head falling under section 10 (1) which is the head of business ".

We are in entire agreement with the view expressed by the learned Chief Justice in this passage.

In addition there is a direct decision of the Nagpur High Court in *Mohanlal Hiralal* v. *Commissioner of Income-tax C. P. and Berar, Nagpur*[2], where an identical question arising in this reference came up for consideration and was decided in favour of the assessee. No doubt the points urged by learned counsel for the Commissioner do not appear to have been urged before that High Court, but the learned

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[1] (1955) 27 I.T.R. 69 : 57 Bom. L.R. 121.

[2] (1952) 22 I.T.R. 448 : I.L.R. (1953) Nag. 256 : A.I.R. 1953 Nag. 173.

Judges have considered all the relevant provisions of the Act, and we are in agreement with the conclusion reached by them. We therefore answer the question referred to us in Case Referred No. 66 of 1953 in the affirmative and in favour of the assessee. The assessee will be entitled to the costs of the reference ; Counsel's fee Rs. 250.

Case Referred No. 80 *of* 1953. The question referred to us for decision under section 66 (2) of the Income-tax Act is :

> " Whether on the facts and circumstances of the case, the share of the assessee's loss out of the sum of Rs. 43,969 cannot be set-off against the profits of the assessee's business in arriving at the total assessable income ".

The assessee who is a resident and ordinarily resident carried on business in the manufacture and sale of lunghies. This business was carried on, *inter alia*, at Rangoon in the accounting year by him in partnership with two other persons. The assessee was the capitalist partner, while the other two were the working partners in charge of the management of the business. During the accounting year relevant to the assessment year the Rangoon business sustained a loss of Rs. 43,969. In the books maintained by the assessee at Madras this sum was adjusted, and in the return filed by the assessee he claimed that this loss from the Rangoon firm should be allowed as a set-off. The income-tax authorities negatived the claim relying on the provisions of section 16 (1) (*b*) and the second proviso to section 24 (1). The Tribunal sustained this disallowance on appeal by the assessee. In our opinion, the point involved in this reference has to be answered in favour of the assessee in view of our decision in Case Referred No. 66 of 1953. This reference is also answered in the affirmative and in favour of the assessee. The assessee will be entitled to his costs, Counsel's fee Rs. 250.

R.M. ——— *References answered in favour of the assessees.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Dr. V. K. John .. *Appellant**

v.

G. Vasantha Pai and another .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 83 *and section* 125 (3)—*Interpretation of section* 83—*'Circular'—Meaning of—Election Petition—Illegal practices other than those on which the relief asked for was based——Tribunal if can inquire into.*

A 'circular' is something addressed to a circle of persons and includes any notice, advertisement etc., produced for distribution. A document may be a circular but not necessarily a placard, poster or bill. Hence any letter or notice printed and circulated among the voters will be within the meaning of the term ' circular ' in section 125 (3) of the Representation of the People Act.

A petitioner in an Election Petition cannot be permitted to include in his petition allegations which are irrelevant to the relief claimed by him. The petition should contain only such facts on which the petitioner relies to obtain the specific relief which he claims. Where a petitioner seeks to have the election of the returned candidate set aside on the ground of corrupt practices, the petitioner cannot be permitted to put in allegations of corrupt practices committed by the other contesting candidates and the tribunal cannot inquire into such allegations.

Sucheta Kripalani v. *Dulat*, I.C.S., (1955) 2 S.C.R. 450 : (1955) S.C.J. 793 : (1955) 2 M.L.J. (S.C.) 289 ; *Raj Krishna Bose* v. *Binod Kanungo*, (1954) S.C.R. 913: (1954) S.C J. 286 : (1954) 1 M.L.J. (S.C.) 489, Explained.

(Scope of Representation of People (Second Amendment) Act, 1956, which has altered the law explained.)

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Balakrishna Ayyar, dated 18th November, 1955 and made in W.P. Nos. 478 and 479 of 1955, W.P. No. 478 of 1955 presented to the High Court under

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* Writ Appeal No. 19 of 1956 and Writ Petition No. 478 of 1956. 21st October, 1956.

Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition or such other writ or such directions as may be appropriate by prohibiting the Chairman, Election Tribunal, Madras, the 3rd Respondent herein from considering any allegation referrable to relief in paragraph 18 (*b*) of the Election Petition No. 28 of 1954 for any purpose whatsoever whether for a finding under section 99 of the Representation of the People Act, 1951, or otherwise and from acting in contravention of the Orders passed by the Honourable Mr. Justice Rajagopala Ayyangar dated 11th January, 1955 and made in Writ Petitions Nos. 719 and 723 of 1954 on the file of the High Court and W.P. No. 479 of 1955, presented under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed with W.P. No. 478 of 1955 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* or any other appropriate writ calling for the records of the Election Tribunal, Madras, the third respondent herein in Election Petition No. 28 of 1954 and quash the order of he Tribunal therein dated 21st June, 1955.

Writ Petition No. 478 *of* 1956.—Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein the High Court will be pleased to issue a writ of *certiorari* or any other appropriate writ calling for the records relating to the Election Petition No. 28 of 1954 on the file of the Election Tribunal, Madras, now in custody of the first respondent and quash the order in so far as it relates adversely to the petitioner herein.

M. K. Nambiar, K. Krishnaswami Ayyangar, T. Ramaprasada Rao and *K. K. Venugopal*, for Appellant in W.A. No. 19 of 1956 and Petitioners in W.P. No. 478 of 1956.

T. Krishna Rao, for Respondent in W.A. No. 19 of 1956.

M. G. Kamath, for Respondent in W.P. No. 478 of 1956.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The above appeal and petition arise out of an election petition filed by the contesting respondent G. Vasantha Pai (who will hereafter be referred to as the respondent) before the Election Commission, New Delhi. The respondent and three others including Dr. V.K. John, the appellant and the petitioner before us, were candidates for election to the Madras Legislative Council, from the Graduates Constituency. Dr. John and one Dr. A. Srinivasan were declared elected to the two vacancies in the constitutency. The respondent filed the election petition praying for the following three reliefs, *viz.*, (*a*) declaring the election to be wholly void ; (*b*) declaring the election of both the returned candidates as void ; and (*c*) giving a finding that the first respondent (Dr. John) has been guilty of the corrupt practices specified in paragraphs 8, 9-a and 11 and illegal practice specified in paragraph 12 of the petition, and the second respondent (Dr. Srinivasan) has been guilty of the corrupt practices specified in paragraphs 8 and 11 of the petition. The illegal practice specified in paragraph 12 was that mentioned in section 125 (3) of the Representation of the People Act, 1951 (XLIII of 1951), hereinafter referred to as the Act. Particulars of the illegal practice were given in Schedule D to the petition. Briefly they were that Dr. John got printed and issued circulars having reference to his election which did not bear on their face the name of the printer. Some of the allegations in the petition fell within section 100, sub-section (1) of the Act and were relevant to the relief of declaration that the election was wholly void. Other allegations related to each of the returned candidates and fell within section 100, sub-section (2) of the Act.

The petition was strenuously contested by both the returned candidates. Though it was filed on the 21st July, 1954, it was not finally disposed of till 16th April, 1956, by an Election Tribunal at Madras constituted by the Election Commissioner. Dr. John and Dr. Srinivasan at the outset of the enquiry took out two applications praying that the Tribunal may be pleased to direct the striking out of prayers (*b*) and (*c*) and to direct the striking out of paragraphs 5 to 7, the latter part of paragraph 8 and paragraphs 9 to 16 of the petition. The main grounds on which these applications were taken out were : (1) that the petitioner (the respondent herein) was not entitled to claim more than one relief and (2) that the petition, in so far as it prayed for the relief of having the election of the returned candidates set aside, was barred by time, as it had not been filed within the period of limitation prescribed by rule 119 (*a*) of the Rules framed under the Act. The Election Tribunal rejected both the petitions. To quash the order of the Tribunal rejecting these petitions, the returned candidates filed two Writ Petitions Nos. 719 and 723 of 1954. These petition were heard and disposed of by Rajagopala Ayyangar, J., who agreed with the Election Tribunal and dismissed them. There were two appeals from the decision of Rajagopala Ayyangar, J. The Division Bench which heard the appeals, to which one of us was a party, agreed with Rajagopala Ayyangar, J., that there was no substance in the first ground. It was held that the petitioner could seek alternative relief's specified in section 84 of the Act. The Bench however took a view different from that taken by Rajagopala Ayyangar, J., on the question of limitation. and held that the petition both against Dr. John and Dr. Srinivasan, so far as relief (*b*) in paragraph 18 of the petition was concerned was out of time under rule 119 (*a*). It was further held that the petition, in so far as it seeks a declaration that the election is wholly void was in time. The following passage in the Judgment of the Division Bench (reported in *John* v. *Vasantha Pai*[1]) sets out the result of the conclusion arrived at by the Bench.

> " The result of our construction of rule 119 is that the election petition is not maintainable against the respondents 1 and 2 so far as relief (*b*) in paragraph 18 is concerned. The Election Tribunal, will, therefore, have no jurisdiction to proceed with the trial of the petition in respect of this relief. The fact that after listening to the parties they overruled the objection as to their jurisdiction in this behalf does not make any difference. If, as we have now found, the Tribunal was not competent to entertain the petition so far as that relief is concerned, the appropriate writ will, therefore, be a writ of prohibition prohibiting the Election Tribunal from proceeding with the trial of the election petition, so far as relief (*b*) in paragraph 18 of the petition is concerned."

When the matter went back to the Election Tribunal for trial, apparently on objection taken by Dr. John and Dr. Srinivasan the Tribunal framed the following issue :—

> " Whether in view of the writ of prohibition in Writ Appeals Nos. 25 and 26 of 1955, the petitioner can claim to rely on the grounds relating to the validity of the election of respondents 1 and 2 for the declaration sought in paragraph 18 (*a*) of the petition that the election is wholly void and for the finding sought in paragraph 18 (*c*) of the petition."

The Tribunal decided that the decision of the Division Bench did not preclude it from investigating matters which were germane to prayers (*a*) and (*c*) merely because those matters also happened to be germane to prayer (*b*). It observed :

> " In the above circumstances, and where the writ issued refers only to the relief and the appeals are otherwise dismissed, we are afraid we will be reading too much into it if the contention of the respondents 1 and 2 be accepted and the prohibition extended by implication to the Tribunal's duty under section 99. This part of the issue is accordingly found in the affirmative for the election petitioner."

Contesting the soundness of this decision of the Tribunal, both Dr. John and Dr. Srinivasan filed petitions under Article 226 of the Constitution for the issue of a writ of prohibition or other appropriate writ restraining the Election Tribunal from trying any issue or enquiring into any allegation which would be relevant only for the purpose of giving relief to the second respondent (the respondent herein) under paragraph 18 (*b*) of his Election Petition, which had been expressly prohibited by the Division Bench. These petitions came on before Balakrishna Ayyar, J.). The learned Judge dismissed the petitions. He was of opinion that the trial of an election petition included an enquiry into allegations of corrupt and illegal practices said to have been committed at the election and that it was not limited merely to ascertain whether the petitioner was, or was not, entitled to the relief he sought. Dealing with the allegation relating to the illegal practice said to have been committed by Dr. John in paragraph 12 of the petition, the learned Judge observed thus :

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[1] (1955) 2 M.L.J. 629, 635.

> "Under section 125 (3) of the Act the issue of any circular, placard, or poster having a reference to the election which does not bear on its face the name and address of the printer and publisher thereof is an illegal practice. Now the omission of the name of the printer or publisher in a circular, or placard or poster cannot possibly have any effect on the result of an election. None-the-less it is an illegal practice and under section 99 of the Act, the Tribunal is required to give a finding on the matter if such a practice is alleged. It would not, therefore be right to say that the trial of an Election Petition must be confined to matters, an investigation of which is necessary to decide whether or not the petitioner is entitled to the relief he seeks."

Against the said order of Balakrishna Ayyar, J., dismissing his petition, Dr. John has filed Writ Appeal No. 19 of 1956. As, however, there was no stay of the enquiry, the Election Tribunal proceeded with the petition and after elaborately dealing with the several charges made in the petition found that the election petitioner was not entitled to the relief he sought in paragraph 18 (*a*) of the petition. But on issue 8, which related to the illegal practice under section 125 (3) of the Act alleged against Dr. John, the Tribunal held against him. The Tribunal found that Dr. John had issued circulars without the name and address of the printer appearing thereon and he was therefore guilty of the illegal practice set out in section 125 (3) of the Act. The Tribunal thereore made the following order :—

> "From our finding on Issue 8 it follows that the first respondent (Dr. John) has committed an illegal practice under section 125 (3) of the Act entailing the consequential statutory disqualifications and we record a finding to that effect."

The reference here is obviously to section 140 of the Act which runs thus :

> " 140.—*Corrupt and illegal practices entailing disqualifications* :—
>
> (1) The following corrupt or illegal practices relating to elections shall entail disqualification for membership for Parliament and of the Legislature of every State, namely :—
>
> (*a*) corrupt practices specified in section 123 or section 124, and
>
> (*b*) illegal practices specified in section 125.
>
> (2) The period of such disqualification shall be six years in the case of a corrupt practice and four years in the case of an illegal practice, counting from the date on which the finding of the Election Tribunal as to such practice takes effect under this Act."

Writ Petition No. 478 of 1956 has been filed by Dr. John to have this part of the order quashed.

Mr. M.K. Nambiar, learned counsel for Dr. John challenged the correctness of the finding of the Election Tribunal on the merits. As pointed out by the Supreme Court in *Jamuna Prasad Mukhariya* v. *Lachi Ram*[1], the finding of the Tribunal that a candidate committed an illegal practice within the meaning of section 125 (3) is a finding on a pure question of fact. But Mr. Nambiar contended that the finding was vitiated by an error apparent on the face because the documents in question did not fall within the category of "circular, placard or poster". We see no substance in this contention. Obviously, none of the documents is a placard or poster. But it is clear to us that three of them are circulars. Mr. Nambiar relied upon decisions in which the corresponding provision in the Representation of the People Act in England was construed ; but the words used in the English Statute are "any bill, placard or poster" and the decisions turned upon the interpretation of the word "bill". In our statute that term is absent and instead we have the word "circular". A document may be a circular but not necessarily a bill, placard or poster. (*Vide* the cases cited in note (*i*) at page 203 of Halsbury's Laws of England, Third Edition, Volume 14 ; also note (*l*) at page 204 of the same book which mentions the case of *Alcott* v. *Emden*[2], in which it was held that a circular headed with the complainant's name and the words "shall he be our new Mayor" and sent to the complainant, the town clerk and four councillors was held to be a bill). We are unable to derive any assistance from the two decisions in *The Cockermouth Division Case*[3], and *The Borough of Oxford Case*[4], which turned upon the meaning of the word "bill".

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[1] (1954) S.C J. 835 : (1955) S.C.R. 608 : (1954) 2 M.L.J. 711 (S.C.).

[2] (1904) 68 J.P. 434 : 20 T.L.R. 487 (D.C.)

[3] 5 O'M & H. 155.

[4] 7 O.M. & H. 49.

According to the meaning given in the Concise Oxford Dictionary, " circular" is something addressed to a circle of persons and the meaning of "circular letter" or "circular" is given as notice, advertisement, *etc.*, reproduced for distribution. Obviously, the material letters were such circular letters printed for distribution among the voters. We therefore accept the finding of fact that the petitioner, Dr. John, was guilty of the illegal practice mentioned in section 125 (3) of the Act.

Mr. Nambiar's next and more serious contention was that the Election Tribunal had no jurisdiction to give a finding on Issue 8 relating to the said illegal practice. His argument was that as the Division Bench of this Court had prohibited the trial of the petition in so far as it pertained to prayer (*b*) in paragraph 18 of the petition, the Tribunal would have no jurisdiction to enquire into any allegation which was material and relevant only to that relief and which had nothing whatever to do with the other relief, *viz.*, a declaration that the election was wholly void. This contention was pressed upon Balakrishna Ayyar, J., who found that there was something to be said for this point of view but it seemed to him it was not the whole of the matter, because an election petition differed fundamentally from an ordinary civil suit. The public were substantially interested in an election petition in seeing that all elections are fair and free and not vitiated by corrupt or illegal practices. It was on this view that he refused to issue a writ of prohibition preventing the Tribunals from enquiring into the allegation of this illegal practice. Mr. Nambiar contended that this view was wrong.

Mr. T. Krishna Rao, learned counsel for the respondent, maintained that it was correct and was supported by the provisions of the Act and the general policy underlying enquiries into the validity of elections. His contention was that the allegations in an election petition need have no reference to the particular relief claimed and once there was an allegation of the commission of any corrupt or illegal practice, the Tribunal was bound to enquire into it and give its finding thereon though such a finding may be thoroughly irrelevant and immaterial having regard to the relief claimed. According to him, all that the writ of prohibition issued by the Division Bench prevented was the relief (*b*) in paragraph 18 of the petition being given to the petitioner. He referred us to section 83 (1) and (2), section 85, and section 90 (4) apart from section 99 of the Act, in support of his contention. Support was also sought by him from observations in certain decisions of the Supreme Court.

Section 83, sub-sections (1) and (2) of the Act run thus :—

> " 83 *Contents of petition*: (1) An election petition shall contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.
>
> (2) The petition shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal practice which the petitioner alleges, including as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice."

The argument of Mr. T. Krishna Rao, which apparently found favour with Balakrishna Ayyar, J., was that sub-section (2) stood apart from sub-section (1) and in addition to the material facts, a concise statement of which had to be furnished, the petition might contain allegations of any corrupt or illegal practice not necessarily related to the relief claimed by the petitioner. In our opinion this construction is not sound. Sub-section (1) uses the general expression "material facts" which would include not merely corrupt or illegal practices, but also allegations of improper reception or refusal of votes and any non-compliance with the provisions of the Constitution or of the Act or of any rules made under the Act and any mistake in the use of any prescribed form. The facts which the election petition should contain are facts on which the petitioner relies presumably to enable him to obtain the specific relief which he claims. All that sub-section (2) says is that if and when a corrupt or illegal practice is alleged certain particulars have to be furnished. That sub-section should not be construed to justify the inclusion of any corrupt or illegal practice which may have no relation whatever to the relief claimed by the petitioner. To give an obvious instance, a petitioner files an election petition praying that the election of one of three returned candidates may be declared void; can it be contended with success that the petition can contain allegations of corrupt or illegal practices committed by the other two candidates? In our opinion, certainly not. Section 83, sub-sections (1) and (2) corresponds to Order 6, rules 2 and 4 of the Code of Civil Procedure which are in the following terms:

> "2.—Every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively, dates, sums and numbers shall be expressed in figures.
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> 4.—In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading".

We may add that sub-section (3) of section 83 corresponds to rule 5 of Order 6 of the Code. It appears to us to be against all principles of judicial procedure that a petitioner should be permited to include in his petition, allegations which are thoroughly irrelevant to the relief claimed by him. Mr. Krishna Rao referred us also to section 85 and section 90, sub-section (4) of the Act, but they do not carry him any further than section 83.

Reliance was placed by counsel on both sides in connection with this point on the observations in the decision of the Supreme Court in *Sucheta Kripalani* v. *Dulat*, I.C...[1] In that case an election petition was filed by one *M* praying that the election of one *S* be declared void and that she *M* be declared to have been duly elected. The validity of the election was attacked on many grounds. A number of major corrupt practices were alleged and further a minor corrupt practice, *viz.*, making a false return of election expenses, was also alleged. It was contended on behalf of the returned candidates *S* that the minor corrupt practice, which could not vitiate the election as it was not capable of materially affecting the election, was wholly outside the scope of a proper election petition and so no cognisance of it can be taken by the Election Tribunal. This contention was repelled by the Supreme Court. Bose, J., who delivered the judgment of the Court said:—

> "The next question argued was whether an Election Tribunal can enquire into a minor corrupt practice if it is of such a nature that, standing by itself, it could not have been made the basis of an election petition because it could not materially affect the result of the election. We need not go into that because the question is purely academic in this case. The allegation about the minor corrupt practice does not stand by itself. There are also allegations about major corrupt practices which require investigation and the minor corrupt practices alleged are reasonably connected with them. Section 143 of the Act is a complete answer to the question of the Tribunal's jurisdiction on this point when it is properly seized of the trial of an election petition on other grounds. Whether it could be properly seized of such a trial if this had been the only allegation, or if the minor corrupt practice alleged was not reasonably connected with the other allegations about major corrupt practices, does not therefore arise. As the trial is proceeding on the other matters the Tribunal is bound under section 143, now that the issue has been raised, also to enquire into the question of the falsity of the return."

In our opinion these observations do not support the contention of Mr. Krishna Rao. If this contention is right and that was what was upheld by the Supreme Court then it was unnecessary to say that the minor corrupt practice alleged did not stand by itself and that it was reasonably connected with major practices which had been alleged. It must not also be overlooked that the election petition in that case was concerned with the validity of the election of a particular candidate and the charge of illegal practice was made against that candidate and one of the grounds on which the election of a returned candidate can be set aside is that the election has been procured, or induced, or the result of the election has been materially affected by any corrupt or illegal practice.

There is another decision of the Supreme Court from which the learned Judge Balakrishna Ayyar, J., quoted certain observations, *viz*, *Raj Krishna Bose* v. *Binod*

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[1] (1955) S.C.J. 793; (1955) 2 S.C.R. 450; (1955) 2 M.L.J. 289 (S.C.).

Kanungo[1]. That again was a case in which an election petition was filed challenging the election of a particular candidate on a number of grounds. One of the grounds was that the returned candidate was guilty of a major corrupt practice mentioned in clause (8) of section 123, *viz.*, obtaining assistance for the furtherance of the prospects of the candidate's election from a Government servant. In addition to this, there were other charges of corruption, illegal practices, undue influence and bribery. The Tribunal gave its finding only on the issue relating to the corrupt practice mentioned in section 123, clause (8) of the Act, but did not give its finding on any of the other issues relating to the various charges levelled against the returned candidate. The Supreme Court held that the Tribunal's construction of clause (8) of section 123 was wrong and set aside its order and remitted the case with a direction that the Tribunal should give its findings on all the issues raised. In doing so, their Lordships expressed their disapproval of the omission of the Tribunal to deal with all the issues thus :—

> " We wish to record our disapproval of the way in which this Tribunal shirked its work and tried to take a short-cut. It is essential that these Tribunals should do their work in full. They are *ad hoc* bodies to which remands cannot easily be made as in ordinary Courts of law. Their duty under section 99 is :
>
> ' where any charge is made in the petition of any corrupt or illegal practice having been committed at the election ' to record ;
>
> ' a finding whether any corrupt or illegal practice has, or has not been proved to have been committed. . . . . . and the nature of that corrupt or illegal practice.'
>
> ' to give the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice and the nature of that practice '. Their duty does not end by declaring an election to be void or not, because section 99 provides that in addition to that : ' at the time of making an order under section 98 the Tribunal shall also make an order, etc. . . . .'
>
> A number of allegations were made in the petition about corruption and illegal practices, undue influence and bribery. It was the duty of the Tribunal not only to enquire into those allegations, as it did, but also to complete the enquiry by recording findings about those allegations and either condemn or clear the candidate of the charges made."

These observations cannot be understood as justifying the inclusion of allegations of corrupt and illegal practices which have no material bearing on the relief sought. It must be borne in mind that the above observations were made in a case in which the other charges made were made against the returned candidate whose election was challenged. Balakrishna Ayyar, J., in dealing with the question now under discussion gave an instance by way of analogy. He said :—

> "Suppose a person were prosecuted for breach of trust and for falsification of accounts. Let us further suppose that by reason of an order made in revision the enquiry into the falsification is prohibited. If we were to hold by reason of such an order, the evidence which may have a bearing on the falsification charge cannot be investigated in order to ascertain whether there has been criminal breach of trust or not, manifest injustice may result."

We are in agreement with the above. Applying the principle of which this is an illustration, to the present case, the only conclusion possible is that the commission of the illegal practice mentioned in section 125 (3) cannot be investigated because such investigation is not necessary in order to ascertain whether the election should be declared wholly void on any of the three grounds on which only such a declaration can be made under section 100, sub-section (1).

The learned Judge went on to say :

> "There are indications in the statute itself to show that the trial of an election petition includes an enquiry into allegations of corrupt and illegal practices said to have been committed at the election and that it is not limited merely to ascertain whether the petitioner is, or is not, entitled to the relief he seeks."

If this dictum of the learned Judge implies that when an election petition filed against *A* to set aside his election contains allegations of corrupt or illegal practices committed by other candidates *B* and *C*, then the Election Tribunal should enquire into such allegations which are totally irrelevant to the relief claimed, we must express our dissent.

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[1] (1954) 1 M.L.J. 489 (S.C.) : (1954) S.C.R. 913 : (1954) S.C.J. 286.

A feeble attempt was made by Mr. Krishna Rao to persuade us to hold that the illegal practice alleged was relevant to the relief contained in paragraph 18 (*a*) of the petition because one of the circulars could be used as evidence of the charge that Dr. John carried on a propaganda against the respondent that he was a Communist. There is no substance in this contention. What may be relevant is the particular circular as a piece of evidence and not the illegal practice itself which consists in the absence of the name and address of the printer on the circular. Indeed, even if the circular had contained the name of the printer, and therefore no illegal practice had been committed, nevertheless, the circular might be used as evidence in support of the charge of propaganda.

We hold that the Election Tribunal had no jurisdiction to enquire into the charge of the illegal practice mentioned in section 125 (3) of the Act made against Dr. John. We therefore allow Writ Petition No. 478 of 1956 and quash that portion of the order of the Election Tribunal which relates to this charge covered by issue 8 and the finding that Dr. John had committed an illegal practice under section 125 (3) of the Act entailing the consequential statutory disqualifications. The order for costs made under section 99 (1) (*b*) of the Act is also quashed. There will be no order as to costs in the petition before us.

Mr. Nambiar also contended in the alternative that even accepting the finding of the Election Tribunal that Dr. John was guilty of the illegal practice mentioned in section 125 (3) of the Act, that finding will not entail any disqualification because of a subsequent amendment of the Representation of the People Act, 1951, by the Representation of the People Act, (Second Amendment) Act, 1956. This amending Act received the assent of the President on the 6th June, 1956 and came into force on the 28th August, 1956. Section 66 of this Act substituted a new Chapter for Chapters I and II in Part VII of the principal Act. By this substitution Chapter II of Part VII of the principal Act has been completely omitted and it is in this Chapter II that section 125 dealing with illegal practices occurs. The result is, from the date of the coming into force of the The Representation of the People (Second Amendment) Act, 1956, no election petition can include a charge of the commission of an illegal practice. The most material section, however, of the amending Act, is section 72. It runs thus :—

> " 72. *Insertion of new section 140-A.*—(1) In Part VIII of the principal Act, in Chapter I, after section 140, the following section shall be inserted, *viz.*
>
> ' 140-A. *Removal, or reduction of period, of disqualifications.*—The Election Commission may, for reasons to be recorded, remove any disqualification under this Chapter or reduce the period of any such disqualification.'
>
> (2) It is hereby declared that any disqualification for membership entailed by any act which has ceased to be a corrupt or illegal practice under the principal Act as amended by this Act shall stand removed."

Sub-section (2) obviously applies to the present case. The finding of the Election Tribunal entailed the disqualification under section 140 of the principal Act. But the Act as amended, has omitted that illegal practice. *Prima facie* the effect of sub-section (2) is that such disqualification stands removed from the date on which the amending Act came into force.

Mr. Nambiar contended that section 72 was a declaratory enactment and that it was retroactive, evidently implying that Dr. John must be deemed to have never been disqualified. On the other hand Mr. Krishna Rao contended that the effect of section 72 (2) of the Amending Act can only be to remove the disqualification from the date when the amending Act came into force, but that the disqualification would exist from the date of the order of the Election Tribunal till the date of the coming into force of the Amending Act. In the view we have taken that the Election Tribunal had no jurisdiction to enquire into the charge under section 125 (3) of the Act and the consequential order we have made quashing the finding of the Election Tribunal on this point, it is not necessary for us to decide the question as to the effect of section 72 of the Amending Act.

Nor is it necessary for us to discuss the effect of section 84 of the Amending Act which excludes the application of the Amending Act to pending elections and pending elction petitions, save as otherwise provided in that Act.

Writ Appeal No. 19 of 1956 must be, and is hereby dismissed on the ground that the appellant sought for a writ of prohibition to which he will not be entitled as the Election Tribunal has completed the enquiry. This dismissal, however, does not mean that we agree with all that is contained in the order of Balakrishna Ayyar, J., against which the appeal has been filed. Actually, in dealing with Writ Petition No. 478 of 1956, we have expressed our dissent from one part of the learned Judge's Judgment. The order for costs passed against the Appellant will be set aside but there will be no order as to costs in the Appeal.

R.M. —— *W.P. No.* 478 *of* 1956, *allowed*:
W.A. No. 19 of 1956, *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

K.G. Rangaswami Chettiar & Co., Bhavani .. *Petitioner**

v.

Commercial Tax Officer, Erode .. *Respondent.*

Madras General Sales Tax Act (IX of 1939) *and Madras General Sales-Tax (Turnover and Assessment) Rules, Rule* 18 (2)—*Validity and construction of—Deduction of value of oil in case of turnover of groundnut sales—Value of oil sold exempt from tax as a result of Article* 286 *of the Constitution—If could be deducted in computing the turnover.*

The tax levied under the Madras General Sales-tax Act on the purchase of groundnuts is not tax on trade and is in substance only a tax on sale. The incidence of the tax is wholly irrelevant in considering its substance or nature. Hence the fact that the total amount of tax payable by an assessee on the purchase of groundnuts exceeds the limit fixed by Article 276 (2) of the Constitution does not render the Act invalid.

The very conception of the concession afforded by Rule 18 (2) of the Madras General Sales-tax (Turnover and Assessment) Rules is that a rebate could be claimed in respect of any turnover only if that turnover has borne the tax before. The turnover contemplated in the rule is the taxable turnover. As the concession granted by the rule is a rebate on the tax paid by a miller on the sale of oil, no claim could be made for rebate on that portion of the turnover on which no tax has been paid, as a result of the same being exempt under Article 286 of the Constitution of India.

Chandramouleswara Oil Co., Kurnool, In re, (1954) 2 M.L.J. 187 and *Radhakrishna Groundnut Oil Mill* v. *State of Madras*, (1954) 2 M.L.J. 550, reaffirmed.

Petition under section 12-B (1) of the Madras General Sales Tax Act praying the High Court to revise the order of the Court of the Sales Tax Appellate Tribunal, Madras, dated 11th December, 1954 and made in Tribunal Appeal No. 639 of 1954.

S. T. Srinivasagopalachari, R. M. Seshadri, V. Tyagarajan for *G. N. Chary* and *R. Srinivasan,* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Order of the Court was made by

Rajagopala Ayyangar, J.—The decision in this batch of Tax Revision Cases involves the construction of Rule 18 (2) of the Turnover and Assesssment Rules framed under the Madras General Sales Tax Act. The material portion of Rule 18 of the Turnover and Assessment Rules whose construction we are called on to decide runs thus :

" 18 (1)—Any dealer who manufactures groundnut oil and cake from groundnut and (or) kernel purchased by him, may, on application to the assessing authority having jurisdiction over the area in which he carries on his business, be registered as a manufacturer of groundnut oil and cake.

(2) Every such manufacturer shall be entitled to a deduction under clause (*k*) of sub-rule (1) of rule 5 equal to the value of the groundnut and (or) kernel purchased and converted by him into oil and cake provided that the amount for which the oil is sold is included in his turnover.

Explanation 1—For the purpose of this sub-rule?

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*Tax Revision Cases Nos. 127 of 1954, etc. 25th April, 1956.

(*a*) 143 lb. of groundnut shall be taken to be equivalent to 100 lb. of kernel :

(*b*) 143 lb. of groundnut of 100 lb. of kernel shall, when converted into oil, be taken to yield 40 lb. of oil ; and

(*c*) one candy of oil shall be taken to be equivalent to 500 lb. of oil.

(3) Every such manufacturer shall submit so as to reach the registering authority not later than the 25th day of every month, a statement in Form A-9 in respect of the transactions relating to the previous month.

* * * * * *

(4) For the purpose of sub-rule (2), the value of the groundnut and (kernel) shall be calculated on the price for which the manufacturer purchased the groundnut and (or) kernel in the month of which his application for deduction relates, or if no purchase was made in that month, the last preceding month in which the manufacturer made the purchase.

(5) * * * * * *

(6) No deduction under clause (*k*) of sub-rule (1) of rule 5 shall be allowed in connection with the sale of groundnut cake ".

Rule 5 (1) (*k*) referred to runs :

" 5 (1) (*k*) :—All amounts which a registered manufacturer of groundnut oil and cake may be entitled to deduct from his gross turnover under Rule 18 subject to the conditions specified in that rule ".

The short question that is raised on the construction of Rule 18 (2) is, whether the value of the oil sold by the dealers which is exempt from taxation by reason of these being sales in the course of inter-State trade or commerce within Article 286 of the Constitution, should be taken into account for the purpose of computing the turnover entitled to deduction under the rules. The departmental authorities decided against the assessee and the tribunal upheld this construction of rule 18 (2), based on the decision of this Court in *Sri Chandramowleswara Oil Company, Kurnool*, In re.[1] That decision was rendered at the stage of admission, and when learned counsel appearing for the several assessees who have preferred the above tax revision cases requested an opportunity to reargue the point, we acceded to the request in view of the importance of the question and the amounts involved. Virtually, therefore, the question we have to consider is the correctness of the decision in the case we have just now referred to.

We must, however, add that a great deal of learning and a considerable amount of ingenuity have been brought to bear on the problem and the arguments addressed to us have not been confined merly to the interpretation of this and the relevant rules, but have included an attack on the validity of the entire set of rules, as also upon the constitutionality of the tax on the purchase of groundnuts imposed by the Madras General Sales Tax Act.

Merely to illustrate the problem which arises, we shall refer to the facts of one of these cases as these are typical of those in the others. T.R.C. No. 108 of 55 relates to an assessee by name Swami Oil Mills, Madras. The assessment is in relation to the year 1950-51. The assessee returned a turnover of Rs. 1,20,78,476-9-2 and claimed an exemption in regard to the turnover of Rs. 72,16,911-12-9 and submitted that he was liable to pay tax only on a net turnover of Rs. 48,61,564-12-5. The gross turnover was accepted by the Deputy Commercial Tax Officer who completed the assessment. This is what the assessing officer stated in regard to the claim for rebate under Rule 18.

" The assessee has submitted applications in Form A-9 in time and claimed a total exemption of Rs. 58,14,290-15-6. But this contains sales of manufactured groundnut oil exported out of India and exempted from tax under item A (that is in the course of export). In his objection letter, dated 27th March, 1952, the dealer stated that he was entitled to rebate under Rule 18 also. Rule 18 deals with exemption on the sale of groundnut oil. The rebate under clause (*a*) is to be allowed only if the sale is otherwise included in the turnover of tax ; and the application in form A-9 also refers to the tax paid and rebate claimed. If, therefore, sales of manufactured groundnut oil exported out of India are eliminated from the taxable turnover there is no question of granting rebate, for the same turnover ".

Eliminating these items he worked out the turnover eligible for rebate under rule 18 at Rs. 51,48,720-15-10 ; and determined the net turnover on that basis and levied the tax. The assessee took the matter in appeal before the Commercial Tax Officer. The point urged before this appellate authority is thus stated by him:

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[1] (1954) 2 M.L.J. 187.

> "The subject-matter of the objection is the refusal of the Deputy Commercial Tax Officer to allow a deduction of Rs. 6,65,569-15-8 from the gross turnover on the ground that the deduction under rule 18 is not admissible as the sale of manufactured groundnut oil exported outside the territory of the Indian Union were not subject to tax or in other words not included in the taxable turnover ".

The argument before him was summarised thus :

> " On behalf of the appellant the following contentions are raised : ' the non-liability to pay tax on sales of oil exported outside the Indian Union under Article 286 of the Constitution cannot be a bar from claiming deduction under Rule 18 ' ".

The appellate authority treated the expression 'turnover' in rule 18 (2) to mean the gross turnover as distinguished from the taxable turnover and upheld the objection of the assessee and allowed the appeal. But this order of the Commercial Tax Officer was set aside by the proceedings of the Deputy Commissioner of Commercial Taxes who held that the construction adopted by the appellate authority was erroneous. The assessee preferred an appeal to the Sales Tax Appellate Tribunal from this order of the Deputy Commissioner and that tribunal following the decision of this Court in *Chandramowleswara Oil Company, Kurnool, In re*[1] dismissed the appeal, and this is the subject-matter of revision before us.

We have already referred to the fact that the arguments before us were not confined merely to the interpretation of rule 18 of the Turnover and Assessment Rules read in the light of the other relevant provisions of the General Sales Tax Act, but have ranged over a wide ground, including the constitutional validity of the taxing provision in the General Sales Tax Act as well as the validity of the Turnover and Assessment Rules. We consider it convenient to dispose of these matters before dealing with the construction of the relevant rules.

Mr. Seshadri, the learned counsel for some of the assessees, contended that the levy of a tax on the purchase of groundnut at the rates prescribed by the Madras General Sales Tax Act was in contravention of the provisions of Article 276 (2) of the Constitution. That Article is in these terms :

> " 276 (2).—The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings, and employments shall not exceed two hundred and fifty rupees per annum :
>
> Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two-hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities."

The argument was on these lines : No doubt the Provincial Legislature under the Government of India Act, 1935, and the State Legislatures under the Constitution are vested with powers to impose a tax on the sale or purchase of goods. That power which is derived under sections 99 and 100 of the Government of India Act, 1935, read with Entry 48 of list II of Schedule VII and the corresponding Articles 245 and 246 of the Constitution of India read with Entry 60 of the State list is subject to the other provisions of the Constitution. One of such provisions is Article 276. The Article has had a previous history. Under section 142-A of the Government of India Act, 1935, which was introduced by the Amending India-Burma Miscellaneous, etc., Act, 1940, a limitation was laid upon the amount of tax "on professions, trades and callings" which might be levied by Provincial Government. The assessees in the present case are carrying on a business, and it is in the course of that business and as constituting it, that they do the buying and selling which give rise to the tax liability. Any tax, therfore, that is levied in respect of the transactions of buying or selling is a tax on the profession. In some cases the businessman is able to pass on the tax to the buyer from him, and the law itself provides a machinery for his being thus recouped. Where, however, there is no statutory provision for the passing on such a tax burden and the

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1. (1954) 2 M.L.J. 187.

tax is collected from the dealer, it is virtually a tax on the dealer on his dealing in the way of his business. It, therefore, amounts to a tax on his trade and attracts to it the limitation as to amount provided in Article 276 (2).

In suport of this argument, learned counsel relied on the decision of the Bombay High Court in *State of Bombay* v. *Chamarbagvalia*[1]. The learned Judges of the Bombay High Court there considered the validity of the Bombay Lotteries and Prize Competition Control Tax Act LIV of 1948 (Bombay). Under that Act the tax was levied on promoters of crossword prize competitions on the gross receipts by way of entrance fees collected from competitors. One of such promoters, the R.M.D.C. Crosswords challenged the validity of the tax, which was sought to be justified as a legislation under Entry 62 of the State List reading "Taxes on betting and gambling." Chagla, C.J., held that the tax was not a tax on betting or gambling as was suggested on behalf of the State, but a tax on trade or calling falling within Entry 60 of Schedule VII of the Constitution. It was held not to be a tax on betting because it was not a tax imposed upon the person who bet or gambled. The learned Chief Justice stated :

> " When we analyse the nature of this tax, it is impossible for us to accept the contention that the tax is on the betting or on the person who lays the bet and the petitioners merely acted as the collecting agents of the State. If the legislation had provided that such competitor shall pay a certain percentage of his entrance fee as tax or that he shall pay so much amount as tax per entry and if the legislation had further provided that the tax shall be collected from the petitioners, then undoubtedly it would have been a tax on betting and gambling and the petitioner would merely have been collecting it for the Government. What is taxed here is openly and obviously the gross proceeds in the hands of the petitioners. What is taxed is what the petitioners have realised in the course of their business as a result of their activity ".

On this reasoning the learned Judges held that this tax was in violation of the limitation imposed by Article 276 (2) of the Constitution, and they declared it unconstitutional.

We do not see any analogy between the facts of that case and the tax on sales now impugned or as regards the applicablity of the reasoning extracted above to the case before us. The legislature has specifically conferred on it, a right to levy a tax on the sale of goods, and it is not disputed that the tax in the present case is a tax on the sale, that is on the transaction of sale. It is not a tax on trade, nor a tax for the privilege of trading. It is a tax on a transaction, and that is its pith and substance, and that is not in controversy. The incidence of the tax is wholly irrelevant for considering its substance or nature. A tax on a transaction such as was provided for by Entry 48 of the Provincial List has necessarily to be laid upon some person concerned in the transaction and this feature cannot, therefore, render it other than a tax upon a transaction. Whatever bearing the incidence of a tax might have in determining its nature in a Constitution such as ours where the enumeration of taxing powers is on a wholly different basis altogether, the fact that the Madras enactment provides some cases where the tax may be passed on to a subsequent buyer, is, in our opinion, wholly irrelevant for the purpose of considering the constitutionality of this tax. It is not as if the Madras General Sales Tax Act was unconstitutional to start with and that the provision on section 8 (*b*) of the Act which was introduced by an amendment of 1947 and the rules which permit registered dealer to collect amounts by way of tax from purchasers from them has validated this enactment. If the reasoning of Chagla, C.J., were applied to the present case, the tax on the sale of goods would be perfectly valid, for the tax is here laid upon a party to a sale just as the Constitution intended. The Constitution, by itself, does not contain any provisions making it conditional that the tax on the transaction of sale would be valid, only if it could be passed on. The learned Chief Justice referred to the tax under the Bombay enactment not being levied on the person who bets, to negative the contention of the State which sought to rest the legislation on Entry 62 of the State list. The decision of the Bombay High Court, therefore, does not afford us any assistance for determining the questions we have to consider. In our opinion the constitutional objection to the

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1. A.I.R. 1956 Bom. 1.

validity of the tax on purchases is entirely without substance. The fact therefore that the total amount of the tax payable by the assessee on the purchase of groundnuts exceeds the limit fixed by Article 276 (2) of the Constitution does not render it invalid.

The next point urged was that the tax was levied on the purchaser of groundnuts by reason of the provision in Rule 4 (2) of the Turnover and Assessment Rules which reads :—

> "In the case of the undermentioned goods, the gross turnover of a dealer for the purpose of these rules shall be the amount for which the goods are bought by the dealer :
>
> (*a*) Groundnut ".

This Rule was made under the powers conferred on the State Government by section 3 (2). Section 3 after laying a tax on every dealer (as defined by the Act) for each year on his total turnover for such year—the tax being calculated at the rate of so many pies for every rupee in such turnover, went on to enact in sub-section (2) which was replaced by the present section 3 (4). The turnover for all the purposes of the Act shall be determined in accordance with and the tax shall be assessed, levied and collected in such manner and in such instalments as may be prescribed by the rules made by the Provincial Government in this behalf.

The contention that was urged was, that the Act itself furnished no criteria for determining the goods whose turnover was to be assessed in the hands of a seller as ditinguished from those in which it was to be assessed in the hands of the buyer and that the delegation of such an extended and unlimited power to the rule-making authority was excessive and amounted to an abdication of legislative power and was, therefore bad. We do not see any substance in this objection either. The general provision in rule 4 is that which is contained in rule 4 (1), under which the turnover that is assessed is that of the seller, that is, the tax is at the sale point. In certain cases, however, and among them are dealings in groundnut, the tax is levied from the purchaser and at the purchase point. In the determination of these goods the economic effect of the tax on the consumer as well as its assistance to export trade have been considered, and that is the basis upon which the goods have been selected. Surely that was a matter for the executive to decide from time to time and need not be necessarily by the legislature for all time, subject only to amendment. We find it unnecessary to dilate further on this point, since it is concluded against the petitioners by the authority of this Court in *Syed Muhammad Co.* v. *State of Madras*[1]. We, therefore, do not see any constitutional objection to the validity of the original section 3 (2) or the present secion 3 (4) of the General Sales Tax Act or Rule 4 of the Turnover and Assessment Rules.

The next attack was upon the validity of the Rules of the General Sales Tax (Turnover and Assessment) Rules, 1939, which enables the tax to be levied and define the basis upon which the turnover is to be determined. The challenge was grounded on the failure to observe the provisions relative to the promulgation of these rules. The General Sales Tax Act (IX of 1939), received the assent of the Governor on 4th June, 1939 and was published in the *Fort St. George Gazette* on the 13th of June, 1939. But it did not come into force immediately. Section 1 of the Act enacts :

> " *Section* 1 (1).—This Act may be called the Madras General Sales Tax Act, 1939.
>
> (2) It extends to the whole of the Province of Madras.
>
> (3) This section shall come into force at once, and the rest of this Act shall come into force on such date as the Provincial Government may by notification in the *Fort St. George Gazette*, appoint."

By a notification, dated 28th September, 1939, under section 1 (3) 1st October, 1939, was fixed as the date on which the rest of the Act shall come into force. It is now necessary to refer to the provisions in the Act under which the Turnover and Assessment Rules whose validity is challenged were promulgated.

Section 3 (2) of the Act which figures as section 3 (4) and (5) ran thus:

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[1] (1952) 2 M.L.J. 598 at 602 to 607.

> "*Section* 3 (2).—The turnover for all the purposes of this Act shall be determined in accordance with, and the tax shall be assessed, levied and collected in such manner and in such instalment as may be prescribed by, the rules made by the Provincial Government in this behalf :
>
> Provided that no rule for the determination of the turnover shall come into force unless approved by a resolution of the legislative Assembly ".

The proviso to section 3 (1) further provided:

> "Provided further (1) that in respect of the same transaction of sale, the buyer and the seller shall not both be taxed, but only one of them, as shall be determined by the rules made in this behalf under sub-section (2), shall be taxed thereon, and (2) that, when the amount for which any goods were bought by a dealer has been included in his turnover, the amount for which the same goods were sold by him shall not be included in his turnover, for the purposes of this Act."

'Prescribed' is defined in section 2 (*f*) to mean 'prescribed by rules made under this Act.'

Section 19 empowers the State Government to make rules. The portions of that section which are material in the present context we shall set out :

> " 19. (1)—The Provincial Government may make rules to carry out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—
>
> (*a*) all matters expressly required or allowed by this Act to be prescribed.
>
> 19. (4)—The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.
>
> 19. (5)—All rules made under this section shall be published in the *Fort St. George Gazette*, and upon such publication shall have effect as if enacted in this Act ".

The net result of these provisions, therefore, is that in regard to the rules under section 3 (2) regarding the determination of turnover the procedure prescribed both by the proviso to that sub-section as well as that pointed out in section 19 (4) have to be followed. In making this observation we have in mind the procedure prescribed by section 19 (4) which is attracted to the rules made under section 3 (2) by reason of the inclusion in section 19 (2) (*a*) of all matters expressly required or allowed by the Act to be prescribed.

Several irregularities or infractions of the law were pointed out in the matter of the promulgation of these rules. We shall deal with them *seriatim*.

It was first urged that there was a violation of the condition imposed by section 19 (4). That sub-section which we have already extracted reads thus :

> " The power to make rules conferred by this section shall be subject to the condition of the rule being made after previous publication for a period of not less than four weeks."

This provision has to be read in conjunction with the Madras General Clauses Act (I of 1891). Chapter 2 of that Act deals with the general provisions applicable to future Acts and this is one of them.

Section 4 (with which that Chapter opens) reads :

> "The chapter shall apply to all Madras Acts made after the commencement of this Act unless a contrary intention appears in such Acts ".

Section 7 which is relevant in connection with the provisions in section 19 (4) enacts:

> "*Section* 7.—Where, by an Act to which this Chapter applies, a power to make is expressed to be given ; subject to the conditions of the rules being made after previous publication, the following provisions shall apply, namely :
>
> (*a*) the authority having the power to make the rules shall, before making them, publish a draft of the proposed rules :
>
> (*b*) the publication shall be made in such manner as that authority, deems to be sufficient, or if the condition with respect to previous publication so requires, in such manner as the Central Government or, as the case may be, the Provincial Government prescribes ;
>
> (*c*) there shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration ;
>
> (*d*) the authority having power to make the rules, and where the rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified ;
>
> (*e*) the publication in the Official Gazette of a rule purporting to have been made in exercise of a power to make rules after previous publication, shall be conclusive proof that the rule has been duly made ".

The draft rules which ultimately became the General Sales Tax (Turnover and Assessment) Rules, 1939, and among these we are at present concerned with rule 4, rules 5 (1) (*k*) and 18 the other rules relevant to the present assessment having been passed long subsequently, were published on the 18th of July, 1939, for eliciting public opinion. The preamble to this publication reads thus :—

> "The following draft rules which it is proposed to make in pursuance of the powers conferred by sub-section (2) of section 3 of the Madras General Sales Tax Act, 1939, is published for general information ".

The reference is to sub-section (2) of section 3, the present sub-sections (4) and (5) being then the provisions which figured as that sub-section. It was stated that the draft would be proposed for approval at the sitting of the Legislative Assembly on the 3rd of August, 1939. Rule 2 provided that the rules shall come into force on the 1st of October, 1939. As stated in this draft publication it was laid before the Assembly on the 3rd of August, 1939. The rules were approved by the house and were published on the 15th of September, 1939; and, as provided in rule 2, thereof, they came into force on the 1st of October, 1939, that date when the rest of the Act was brought into operation by the notification under section 1 (3).

The first irregularity pointed out was that there was a violation of section 7 (*c*) of the General Clauses Act in that in the draft which was published on the 18th of July, 1939, there was no notice specifying a date at or after which the draft would be taken into consideration. Under the proviso (3) to section 2 as it then was and section 3(4) as it exists now, the rules had to be approved by the Legislative Assembly before becoming effective. 'Taken into consideration' will necessarily refer to the specified date at which the draft would be taken into consideration, that is, by the Legislaive Assembly. In our opinion there was a literal compliance with the terms of section 7 (*c*). Section 19 (4) prescribed a minimum interval of four weeks between the previous publication and the rules coming into operation and it is not contended that condition was not satisfied, since the rules were published in the Gazette on 28th July, 1939, and came into operation on 1st October, 1939.

In view of our conclusion on this point, it is not necessary to refer to section 7 (*e*) under which the final publication in the Official Gazette of a rule is taken to be conclusive proof that the rule has been duly made.

It was urged by Mr. Seshadri, learned counsel for the petitioners, that sub-section (*e*) would be attracted only to a case where the published rule expressly purports to be made in exercise of a power to make rules after previous publication and that as the notification dated 15th September, 1939, did not in terms purport to be made after previous publication the provisions of that sub-section were not attracted to these Rules. We are unable to accept this construction of that prvision, which is designed to put an end to all controversy as regards the formalities prescribed by the preceding sub-sections. But, as we have reached the conclusion that there has been a due compliance with sub-section (*c*), it is unnecessary finally to decide the exact scope or application of sub-section (*e*).

The next objection was that the rules were bad, in that the resolution of the Legislative Assembly referred in the proviso to section 3 (4) was passed at a time when section 3 (4) had not been brought into force, because the only portions of the enactment which came into force on the passing of the Act was section 1 and the rest of the Act came into operation only by the notification in the *Fort St. George Gazette* which fixed 1st October, 1939, as the date when it would come into force. In our opinion, there is no substance in this point either. Section 6 of the General Clauses Act, which applies to the Madras General Sales Act, enacts :

> "Where, by an Act to which this Chapter applies and which is not to come into force immediately on the passing thereof, a power is conferred on Government or other authority to make rules, or to issue orders with respect to the application of the Act, or with respect to the appointment of any officer thereunder, such power may be exercised at any time after the passing of the Act, but rules or orders so made or issued shall not take effect till the commencement of the Act ".

It is by virtue of the power thus conferred that the rules made under the Act were got ready for being brought into force on 1st October, 1939. Section 6 refers not merely to the powers conferred on the Government in the matter of making rules but also to other authority. The approval of the Legislature is merely part of the procedure or machinery for making of the rule : and by virtue of section 6 of the General Clauses Act it must be taken that that provision also was in operation from the date of the passing of the Act; and that power could be exercised at any ime after the passing of the Act, though, " however, the rule so made shall not take effect until the commencement of the Act."

A minor point which was feebly suggested was that it was not proper that the rule should be approved by a resolution merely of the Legislative Assembly and not also by the Legislative Council. We do not see any force in this point; because it is a matter for the legislature to determine the formalities as to how the rule shall be framed. We do not see any impropriety, unconstitutionality or irregularity in the terms of the proviso to section 3 (2) as it originally stood which is now the proviso to section 3 (4) by which the power of approval is confined to the Legislative Assembly of the State Legislature.

We shall now pass on to a consideration of the construction of rule 18 (2) and the other relevant provisions of the Sales Tax Act on the basis that the rules had been validly passed. We consider that the scope of the provisions which are now found in the Act and the rules, would best be determined by reference to their form, language, and contents from time to time.

The Madras General Sales Tax Act, 1939, as it was originally passed, with which the rules came into force on 1st October, 1939, did not as already mentioned contain the rebate provided by the present rule 18 (2). Rule 18 was introduced by G.O. No. 1515 Rev. dated 5th July, 1941, while rule 5 (1) (*k*) of the Turnover and Assessment Rules came in much later under G.O. No. 2051 Rev. dated 13th October, 1944. The position, in 1941, before rule 18 was introduced was this. On the purchase of groundnut a tax was levied on the purchaser on his purchase turnover (rule 4 (2) of the Turnover and Assessment Rules). When such a purchaser converted the groundnut into oil and cake by milling it, these products were treated as commodities different from the groundnut on which tax had been paid at purchase point and became liable to tax on their sale turnover in the hands of the miller-dealer under rule 4 (1) of the Turnover Rules. As groundnut and oil were treated as different commodities the second proviso to section 3 (1) did not come into play. That provision was in these terms :

> "When the amount for which any goods were bought by a dealer has been included in his turnover the amount for which the same goods were sold by him shall not be included in his turnover for purposes of this Act".

So that, the position was that the miller, who extracted oil from groundnut purchased by him, was liable to pay tax both on the purchase of his groundnut as well as on the sale of the oil and cake by him. This, however, was subject to the terms of section 7 which provided some relief. This section enacted :

> " *Section* 7.—In respect of such finished articles of industrial manufacture as may be notified by the State Government and subject to such restrictions and conditions as may be prescribed, a rebate shall be allowed on one half of the tax levied on sales of such articles for delivery outside the State if such articles are actually so delivered ".

Where, therefore, the oil or cake was sold for delivery outside the province and they were so delivered, there was a rebate of one half of the tax levied on the sale turnover.

Thix was the position until rule 18 was introduced, and its purpose was obviously to alleviate the hardship which arose out of the same dealer having to pay tax both on the purchase of groundnut and on the sale of the oil. This was particularly needed because groundnut oil was a commodity in regard to which there was considerable amount of export there being a demand for this variety of oil in foreign markets. Sub-clause (1) of rule 18 provided for the registration of manufacturers of groundnut oil. This was designed to provide a method of checking that the benefit of this provision was confined to those for whom it was intended. Sub-clause (2) contained the benefit which was to be conferred on such vendors of oil. The original form which the sub-clause (2) took when it was introduced in July, 1941, was :

> "Every such manufacturer shall be entitled to a rebate of the tax payable under the Act on groundnut and or kernel purchased and converted by him into oil and cake, provided that the amount for which the oil is sold is included in his turnover".

Then followed an explanation which provided a table of conversion for groundnut, kernel and oil. This provision was in nearly the same terms as is now found in rule 18 and as we have set this out in the opening paragraphs we are not repeating it here. After the explanation followed two *illustrations* which have subsequenty been omitted. These were :

> "*Illustration* 1.—*A* purchases 7,400 lbs. groundnut (not kernel) in a certain month for Rs. 195. In the same month, he sells two candies of oil for Rs. 90. Two candies of oil is equal to 1,000 lbs. of oil which is equal to 3,325½ lbs. of groundnut. Against the sales tax due on Rs. 90, *A* may claim a rebate on the tax paid on the purchase of 3,325½ lbs. calculated at 7,400 lbs. for Rs. 195.
>
> *Illustration* 2.—*A* purchases 14,800 lbs. groundnut for Rs. 400 and 10,000 lbs. of kernel for Rs. 385 In the same month, he sells two candies of oil for Rs. 90. At the rate of 143 lbs. of groundnut to 100 lbs. kernel, 14,800 lbs. nut is equal to 10,349½ lbs. kernel, so his total purchases for the month are reckoned at 20,349½ lbs. kernel for Rs. 785.
>
> 1,000 lbs. of oil equal to 2,325½ lbs. kernel, against the sales tax due on Rs. 90. *A* may claim a rebate of tax on the purchase of 2,325 lbs. kernel, calculated at 20, 349½ lbs. purchased for Rs. 785 ".

Then followed sub-clauses (3), (4) and (5), which then ran:

> " (3) Every such manufacturer shall, not later than the 20th day of each month, submit a statement to the registering authority furnishing the following particulars in respect of transactions relating to the previous month :—
>
> (i) the aggregate amount of groundnut and or kernel purchased by him, the total purchase price and the tax paid on such purchase ; and
>
> (ii) the quantity of the groundnut oil manufactured, the amount for which it was sold and the amount included in the turnover and the sales tax due.
>
> (4) The rebate shall be worked out on the price for which the manufacturer purchased the ground nut and or kernel in the month to which his application for rebate relates or, if no purchase was made in that month, in the last preceding month in which the manufacturer made the purchase.
>
> (5) No rebate of tax on purchase of groundnut and or kernel shall be allowed in connection with the sale of groundnut cake".

On rule 18 (2) as it then stood two things would be clear : (1) that the rebate that was granted was of the tax paid on the purchase of the groundnut. In other words no rebate could be claimed where no tax had been paid on the purchase. (2) As the subtrahend was the tax paid, it would follow that the minuend also would be the amount of the tax paid. Though the expression used in rule 18 (2) was "the amount for which oil was sold is included in his turnover" it would necessarily mean his taxable turnover. The very conception of the concession afforded by rule 18 (2) being a rebate would require that the turnover had borne tax before the rebate is claimed, a matter expressed with clarity in the illustrations which then formed part of the rule.

To test what we have stated above, it would be useful to consider the combined effect of section 7 and rule 18 (2) where oil was sold for delivery outside. In such cases where the oil was sold outside the State the rebate provided for by section 7 would also operate, with the result that half the tax payable on the sales after the rebate obtained under rule 18 (2) would be leviable from the dealer. We shall illustrate the effect of this in a concrete case. Suppose the total value of the kernel purchased by a miller on which he has been taxed under rule 4 (2) of the Turnover Rules is Rs. 6,400; the tax on that would be Rs. 100. If he has milled the entire quantity of the kernel and the value of the oil sold is, say, Rs. 9,600 and of the cake Rs. 1,280; he would have been liable to a tax of Rs. 150 on the oil and Rs. 20 on the value of the cake sold. Before rule 18 (2) the total amount of tax that would have been collected from him would be Rs. 100 *plus* Rs. 150 *plus* Rs. 20. After rule 18 (2) came into operation, the position would be this. Out of Rs. 150 payable as tax on the sale of the oil he would have been entitled to claim a reduction of the Rs. 100 he had already paid as tax on his purchase turnover. He would therefore be liable to a tax of Rs. 50 alone, in regard to the sales. In other words, he would have paid Rs. 100 at the moment of his purchase *plus* Rs. 50 that is Rs. 150 at the moment of the sale of the oil on both the purchases and the sale of the oil, in addition to tax of Rs. 20 on the cake sold. If he were to export the oil, so as to bring himself within the concession granted by section 7 the effect would be this. He would have paid a tax of Rs. 100 on the purchase. After the rebate under rule 18 (2) he would be paying a tax of Rs. 50 on the sale of the oil and on this he would obtain a further rebate of Rs. 25 under section 7 ; and he would also obtain a rebate of Rs. 10 if the cake was also sold outside. In other words, the total amount of tax then payable by him would be Rs. 100 *plus* Rs. 25, *plus* Rs. 10.

Rule 5 (1) (*k*) was introduced by G.O. No. 2051 dated 13th October, 1944, reading thus :—

> " 5 (1) (*k*).—All amounts which a registered manufacturer of groundnut oil and cake may be entitled to deduct from his gross turnover under rule 18 subject to the conditions specified in that rule ".

The same G.O. amended the language of rule 18 (2) by substituting for the words "to a rebate of the tax payable under the Act on groundnut and or kernel" the expression " to a deduction under clause (*k*) of sub-rule (1) of rule 5 equal to the value of the groundnut or kernel" and the illustrations to rule 18 (2) were omitted as also the words " the tax paid" in sub-rule (3) of rule 18. In our opinion the changes thus made in the language of rule 18 were merely formal and made no difference in the content of the provision.

When, on 26th January, 1950, the Constitution came into force, and with it there was a ban on the imposition of tax on the sale of goods which was the subject of inter-State trade or commerce, two new factors came in. Firstly, where the goods which were outside the State were purchased in the course of inter-State trade or commerce, a tax on their purchase could not be levied by the State. Secondly, where the oil produced in the State were exported to other States, and the transport involved in the transaction was an integral part of the sale, Article 286 (2) imposed a ban on the levy of tax on such transactions. As groundnut oil was the subject of considerable sales of this character, the effect of it was, that a large volume of such sales became exempt from tax under the Sales Tax Act. If the primary idea were borne in mind that the concession granted by rule 18 (2) is in the nature of a "rebate" on the tax paid by a miller on the sale of oil, there cannot be any doubt that no claim could be made for rebate on that portion of the turnover on which no tax had been paid. The only question is whether the change in the language of the rule, by which the expression 'rebate' which occurred there has been omitted, makes any difference to the scope of the concession. In considering this, it might not be irrelevant to take into consideration the contents of Form A-9, which the dealer is required to submit before he can obtain the benefit of that concession. This form was introduced by a notification, G.O. No. Ms. 99 Rev. dated 11th January, 1950. That G.O. also effected amendments to rule 3 by replacing the original sub-rule (3) which we have set out earlier by the present sub-rules (3) and (3-A) which run thus :

> " (3) Every such manufacturer shall submit so as to reach the registering authority not later than the 25th day of every month, a statement in Form A-9 in respect of the transactions relating to the previous month.
>
> (3-A) If any such manufacturer fails to submit the statement in Form A-9 within the time specified in sub-rule (3) or if he omits to furnish any of the particulars required by that form, the Commercial Tax Officer may, in his discretion, after making such enquiry as he considered necessary, condone the delay or omission or both :
>
> Provided that such manufacturer has maintained a true and correct account of his business showing all the particulars required by sub-rule (3) ".

The Form A-9 is in these terms:

> " Application for rebate under rule 18 of the Turnover and Assessment Rules. (*See* rule 18 (3)).
>
> To
>
> The Assessing Authority,
>
> Sir,
>
> I/We registered manufacturer(s) of groundnut oil at request that I/We may be granted a rebate of tax under rule 18 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, in respect of the sale of oil manufactured by me/us, particulars of which are given below :

1. Quantity of groundnut reduced to kernel and or/kernel purchased.
2. Purchase rate.
3. Total purchase price.
4. Quantity of manufactured oil remaining unsold at the end of previous month.
5. Quantity of oil manufactured in the month.
6. Total (column 4 *plus* column 5).
7. Quantity sold out of that in column 6.
8. Balance (column 6 *minus* column 7).
9. Rate at which sold.
10. Total sale value.
11. Amount of tax paid.
12. Quantity of kernel required to yield the oil in column 7.
13. Turnover on which rebate to be allowed (column 12 × column 2).
14. Amount of rebate claimed.

Note.—(1) Reduce groundnut kernel as per the following table: 143 lb. of groundnut is equivalent to 100 lb. of kernel.

100 lb. of kernel is equivalent to 40 lb. of oil.

500 lb. of oil is equivalent to one candy.

(2) In column 1, quantity purchased in the month and, if no purchase is made in the month, that in the last preceding month should be noted.

(3) Give reasons if the amount in column 13 should exceed that in column 10.

(4) The statement should be submitted so as to reach the registering authority not later than the 25th day of every month in respect of the transactions relating to the previous month ".

It will be seen that this form sets out in more detail the basis upon which the original sub-rule (3) not only referred to the concession under rule 18 (2) as a rebate but made it clear that that rebate was a deduction from the tax paid and not a subsidy. We are making this observation because if the argument of counsel for the assessees is accepted, rule 18 (2) would become a subsidy. This basic idea of the concession being a rebate was clearly brought out by the terms of rule 18 (2) in the form in which it stood when it was introduced into the rules in 1941. The change in the language of the rule, by which the expression 'rebate' was eliminated from the rule, while it still appeared in Form A-9 should not make any difference in the scope or effect of the concession. In our opinion this was merely a drafting device which was evidently considered to be necessitated to bring it in conformity with the provision of rule 5 (1) (*k*) introduced in 1944. If the concept of the concession being a "rebate" is borne in mind, it would be clear that the deduction is from the tax paid, which necessarily posits the previous payment of the tax. The idea behind the concession is that, when a dealer pays tax on the oil sold, he is reimbursed that proportion of the tax, worked out on the basis of the conversion table in rule 18 (2), the amount of the tax paid on the purchase of the groundnut which has gone into the production of the oil. Thus viewed, the dealer cannot claim the "repayment" of a tax that he has not paid at all. Conversely, in the computation of the purchase-tax which he is entitled to get a refund of that part of his turnover on which he has paid no tax at the moment of purchase would also have to be excluded and this is exactly the interpretation laid down by the two decisions of this Court in *Sri Chandramowleswara Oil Co., Kurnool,* In re[1] and *Radhakrishna Groundnut Oil Mill* v. *State of Madras*[2].

To pursue the concrete case which we have set out earlier with variations to illustrate the present point: If out of the purchase of kernels for Rs. 6,400 the miller obtained oil valued at Rs. 9,600 and exported oil outside the State in the course of inter-State trade to the extent of Rs. 6,400 and sold oil within the State for Rs. 3200, the result would be that no tax would be leviable on the sales to the extent of Rs. 6400, as that would be protected by Article 286 (2) of the Constitution. The argument of the assessees is that the miller would be entitled to calculate rebate on the basis that the sale turnover to be taken into account is Rs. 9,600. If such were the case, the position would be this. The assessee would have paid a tax of Rs. 100 at the time when he purchased the kernel. He would have paid a tax of Rs. 50 when he sold the oil within the State, the rest of the sales of the oil to the extent of Rs.6,400 not being subjected to tax by reason of the Constitution. Therefore the total amount of the tax paid by him on the sale turnover would have been Rs.50. If the argument of the assesse were accepted it would mean that in such a case, as the miller had paid Rs. 100 at the time of the purchase, he would be entitled to a refund of Rs. 100, this being the difference between Rs. 150 the tax which would have been payable on the turnover, if it were subject to tax, and Rs. 100 the purchase tax actually paid by him. In other words he would get a refund of Rs. 50 which would be the entire amount of sales tax paid by him on his internal sales. To press it to its logical extent, if the entire Rs. 9,600 worth of oil had been sold outside the State, the result would be that the miller would be entitled to get from the Government a subsidy of Rs. 50, that is, a refund of a portion of the sales tax paid by him out of the purchase tax which had been collected at the moment of his purchase under section 4 (2). In our opinion, this result amply demonstrates that the argument put forward as to the construction of this provision is unsound. The changes effected in the language of rules 18 (2) and 18 (3) by the amendments carried out from 1944 up to the assessments in the present cases do not, in our opinion, affect the substance of the relief granted. In our judgment, the basic idea underlying the relief to be granted is as regards the tax paid; and this is brought out by Form A-9 which is part of the rule. Though in terms the rule as it now stands refers to the turnover, it is in our opinion, merely a convenient mode of referring to the tax levied on the basis of the turnover, for, in essence the sub-rule is designed to grant a rebate, a rebate in the tax. Therefore, both in the subtrahend as well as in the minuend it is the tax that is material. Just as a purchase turnover on which no purchase tax has been levied could not be included in the subtrahend similarly, no sale on which tax has not been paid could be intended to be included as part of the turnover in the minuend as envisaged by the provision.

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[1] (1954) 2 M.L.J. 187.

[2] (1954) 2 M.L.J. 550.

Learned counsel for the assessees urged that as this was a taxing enactment we should not travel beyond the words used and imply a tax which had not in express terms been laid by the legislature. Stress was laid on the language of section 5 (1) (*k*) by which a registered manufacturer was declared entitled to deduct from his gross turnover the amounts mentioned in rule 18 and to the terms of rule 18 itself where the reference to the turnover of the oil sold was general and not confined to the taxable turnover. Learned counsel contended that, in the absence of any expression in rule 18 (2), confining the turnover to the taxable turnover, the Court ought to construe that expression as including his entire turnover—turnover as defined by section 2 (1) read in conjunction with Explanation (2) to section 2(*h*). The argumet was that otherwise we would be reading into the taxing provision words which were not there; in the present instance the word 'taxable' before the expression 'turnover' which occurs at the end of rule 18 (2). We were invited to the decisions bearing upon the construction of taxing enactments and particularly a passage in the judgment in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*[1], where Rowlatt, J., said :

> " In the taxing Act one has to look merely at what is clearly said ; there is no room for any intendment. There is no equity about a tax ; there is no presumption as to tax, nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Having considered the argument carefully we are clearly of the opinion that it ought to be rejected. The legislative history of this rule affords positive proof that the construction urged on behalf of the assessees for our acceptance is erroneous. The language of Form A-9, which has replaced portions of rule 18 as it originally stood, makes it clear that the provision is only concession by way of a rebate on the tax paid. Coming to the argument based on the enactment being a taxing measure and therefore should be held not to levy the tax unless the words were clear, we have to point out that the provision in rule 18 (2) does not levy a tax but provides an exemption. In regard to the construction of such provisions, Cohen L.J., pointed out in *Littman* v. *Barron*[2].

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[1] L.R. (1921) I K.B. 64.

[2] L.R. (1951) Ch. 993 : (1951) 2 All E.R. 393.

> "In view of an argument addressed to us by junior counsel for the Crown, I would add that I agree with him that the principle that in case of ambiguity a taxing statute should be construed in favour of the tax-payer does not apply to a provision giving a tax-payer relief in certain cases from a section clearly imposing a liability."

In the result the conclusion that we have reached is just in accord with what this Court laid own in *Chandramowleswara Oil Mills, Ltd., Kurnool*, In re[1], and this is about what we have termed the figure from which the purchase tax has to be deduced. So far as the purchase tax itself is concerned, that is the tax on the purchase turnover, this is governed by this Court's decision in *Radhakrishna Oil Mill* v. *State of Madras*[2]. Both these decisions are logical complementaries of each other and after a full and exhaustive consideration of the points urged by the learned counsel for the assessees, we are clearly of the opinion that both these decisions correctly interpret the relevant provisions of the Sales Tax Act.

In this view all the Tax Revision Cases are dismissed.

R.M. *Revision cases dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Kuppammal .. *Petitioner**

v.

Vellingiri Gounder and another .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 4—Scope and effect of—Tenants' right to be restored to possession—When arises.

The scheme of section 4 of the Madras Cultivating Tenants' Protection Act is that it gives a cultivating tenant the right to be restored to possession of land of which he has been in possession on 1st December, 1953 and who has been dispossessed and is not in such possession at the commencement of the Act. This right of the tenant is subject to certain exceptions as laid down in sub-section (2) of that section.

Having regard to the general scheme and purposes of the Act and the other provisions of section 4 of the Act the right to be restored to possession is restricted only to the tenants who have been evicted by or at the instance of the landlord and does not extend to the case of tenants who have surrendered possession voluntarily to the landlord. Though the language of section 4 (1) is very general, having regard to the provisions of the other sub-sections the phrase 'who is not in possession thereof at the commencement of this Act' in section 4 (1) is not to be read literally, but has to be read as meaning 'who, by reason of an eviction, is not in possession'. The term 'evict' in section 4 of the Act signifies only an eviction by any act or conduct on the part of the landlord and there would be no eviction within the meaning of the section when a tenant voluntarily and willingly surrenders possession of the land to the landlord.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed with W.P. No. 576 of 1956 the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Revenue Divisional Officer, Coimbatore, dated 26th April, 1956 and made in O.P. No. 12 of 1955 and quash the order made therein.

The Advocate-General (*V. K. Thiruvenkatachari*) and *S. Gopalaratnam* for Petitioner.

K. Parasurama Iyer for the 1st respondent.

The Special Government Pleader (*V. V. Raghavan*) on behalf of the State, in both the Petitions.

The Court made the following

ORDER.—These two writ petitions raise for consideration a very important question as to the scope of section 4 of the Madras Cultivating Tenants' Protection Act (XXV of 1955). The two petitions arise out of the same order of the Revenue Divisional Officer and seek respectively writs of *certiorari* and *mandamus* in regard to matters which we shall elucidate a little later.

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[1] (1954) 2 M.L.J. 187.

[2] (1954) 2 M.L.J. 550.

* W.P. Nos. 576 and 577 of 1956. 25th September, 1956.

The petitioner is the land-owner. The property now in dispute whose extent is 92 acres 67 cents. was purchased by her under a deed of sale dated 23rd May, 1955. The first respondent Vellingiri Gounder and another Pappiah Naidu (not a party to the petition) were the tenants previously in cultivation of these lands. As the petitioner insisted upon her vendor giving her vacant possession as a condition of her purchase of the lands the latter negotiated with the 1st respondent and his co-lessee, and as a result of an agreement the tenants were paid a sum of Rs. 9,000 as consideration for their surrendering immediate possession of the lands. They executed a document therefor on 20th May, 1955. It will be seen that the sale deed was executed in favour of the petitioner three days after this relinquishment and surrender. Subsequent to the purchase, the petitioner started cultivating the lands personally, and while she was doing so, Madras Act XXV of 1955 was passed, the same having received the assent of the President on 24th September, 1955. Claiming rights under this enactment, to whose terms we shall advert presently, the 1st respondent applied to the Revenue Divisional Officer, Coimbatore, for an order directing his restoration to possession of the lands of which he had relinquished possession and which were the subject of purchase by the petitioner.

The petitioner landowner who was impleaded as a respondent to that application raised two defences: (1) that on a proper construction of section 4 of the enactment a tenant who had voluntarily surrendered possession of the lands was not entitled to claim restoration and (2) that even if section 4 was capable of that construction the tenant owned and possessed lands exceeding the extent specified in section 4 (2) (i) and was therefore not entitled to the order for restoration. The Revenue Divisional Officer rejected both these defences; and the petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution to set aside the order of the Revenue Divisional Officer on the ground that it was beyond his jurisdiction and it was also vitiated by error apparent on the face of the record. This is the subject-matter of W.P. No. 576 of 1956.

W. P. No. 577 of 1956 is for the issue of a writ of *mandamus* and is concerned with the manner in which the officer has dealt with the second of the defences which we have mentioned above. But with this latter we shall deal after considering the proper interpretation of section 4, which is raised by the the first of the defences we have mentioned above.

The material portions of Act XXV of 1955 which are relevant in the present context are sections 4 (1) and 4 (2) which run thus :

> "4 (1).—Every cultivating tenant who was in possession of any land on the 1st December, 1953 and who is not in possession thereof at the commencement of this Act shall, on application to the Revenue Divisional Officer, be entitled to be restored to such possession on the same terms as those applicable to the possession of the land on the 1st December, 1953.
>
> (2) Nothing in sub-section (1) shall be deemed to entitle any such cultivating tenant to restoration of possession—
>
> (i) If, on the day this Act comes into force, he is in possession, either as owner or as tenant or as both, of land, exceeding the extent specified in the Explanation below or if he has been assessed to any sales-tax, profession-tax or income-tax under the respective laws relating to the levy of such taxes during 1953-54 or 1954-55 ; or
>
> (ii) if the landlord after evicting such cultivating tenant from the land, has been cultivating the land by his own labour or by that of any other member of the family or by hired labour under his supervision or control, provided as follows :
>
> (*a*) the total extent of land held by such landlord inclusive of the land, if any, held by him as a tenant does not exceed the extent specified in the explanation below ; and
>
> (*b*) the landlord has not been assessed to any sales-tax, profession tax or income-tax under the respective laws relating to the levy of such taxes during 1953-54 or 1954-55 ; or
>
> (iii) if subsequent to the 1st December, 1953, the landlord has *bona fide* admitted some other cultivating tenant to the possession of land and such other tenant has cultivated the land before the commencement of this Act ;
>
> Provided that where such other tenant is in possession, either as owner or or as tenant or as both of any other land which exceeds the extent specified in the Explanation below and the cultivating

tenant who was evicted is not in possession of any land or is in possession of any other land which is less than the extent specified in the said Explanation, the cultivating tenant shall be entitled to restoration of possession.

Explanation.—The extent referred to in clauses (*i*) to (*iii*) above is 6-2/3 acres of wet land or dry land irrigated from any Government source of irrigation, which shall be taken to be equivalent to 20 acres of dry land not irrigated from any Government source of irrigation for the purpose of determining the extent of land in any case where it consists of one or more of the classes of land mentioned above ".

The application preferred by the first respondent to the Revenue Divisional Officer was under section 4 (1) of the Act. If section 4 (1) stood alone without reference to the other provisions of the enactment, it is not disputed that the first respondent would have satisfied its terms. He was a cultivating tenant as defined in section 2 (*a*) in possession of the land on 1st December, 1953. He was also a person who was not in possession thereof at the commencement of this Act (24th September, 1955) as he had relinquished and surrendered possession on 20th May, 1955. If the words in section 4 (1) "who is not in possession thereof at the commencement of this Act ", were to be read literally as meaning a person who for whatever reason is not factually in possession of the land on the specific date, there can be no doubt that the first respondent would be entitled, on application to the Revenue Divisional Officer, subject to exceptions in section 4 (ii) which we shall ignore for the present to be restored to possession of the land. The question raised for our consideration is whether the enactment intended the expression " who is not in possession thereof at the commencement of this Act " to be read literally or whether the several provisions import other considerations qualifying the literal meaning of this phrase.

The learned Advocate-General, who appeared for the petitioner, submitted to us that in view of the general scheme of the enactment, its purpose and policy as well as the express provisions contained in it, the expression " who is not in possession thereof at the commencement of this Act " in section 4 (1) has to be read as meaning " who is not in possession thereof by reason of eviction by or at the instance of the landlord ", and as excluding cases where the tenant having been in possession on 1st December, 1953, ceased to be in possession at the commencement of the Act by reason of voluntary surrender on his part.

We shall first consider the express provisions of the enactment which throw light on the proper construction of section 4 (1). These are two in number, and they are found in the conditions subject to which alone a cultivating tenant of the class specified in section 4 (1) is entitled to restoration. Section 4 (2) (*ii*) is one such provision, and merely for convenience we shall repeat its terms :

" 4 (2).—Nothing in sub-section (1) shall be deemed to entitle any such cultivating tenant to restoration of possession.

(ii) if the landlord, after evicting such cultivating tenant from the land has been cultivating the land by his own labour or by that of any other member of his family or by hired labour under his supervision or control."

It would be apparent that section 4 (2) (*ii*) makes a provision rendering sub-section (1) inapplicable to a case where the landlord resumes personal cultivation after " an eviction " subject of course to the proviso to section 4 (2) (*ii*) which for the present purpose are not material.

If the phrase " who is not in possession thereof at the commencement of this Act " in section 4 (1) were read literally as meaning "who is not in possession he reason either of, an antecedent eviction or of voluntary surrender as these are the only two alternatives by which possession might be lost it would be seen that wilby an evicting landlord who resumes possession for personal cultivation is afforded a protection though somewhat limited, by section 4 (2) (*ii*), no such qualified protection even is afforded in cases where the tenant voluntarily surrenders and, by virtue thereof, " is not in possession at the commencement of the Act ". If the construction adopted by the Revenue Divisional Officer were accepted, it would mean that in such cases of voluntary surrender section 4 (2) (*ii*) would be inapplicable to protect the landlord and that the Act conferred higher rights on a surrendering tenant than on an evicted one, which is certainly illogical.

The next provision to which our attention was drawn was the language of the proviso to section 4 (2) (*iii*). We shall repeat this provision also which reads :

> " 4 (2).—Nothing in sub-section (1) shall be deemed to entitle any such cultivating tenant to restoration of possession.
>
> (iii) if subsequent to the 1st December, 1953, the landlord has *bona fide* admitted some other cultivating tenant to the possession of land and such other tenant has cultivated the land before the commencement of this Act ;
>
> Provided that where such other tenant is in possession, either as owner or as tenant or as both of any other land which exceeds the extent specified in the Explanation below and the cultivating tenant who was evicted is not in possession of any land or is in possession of any other land which is less than the extent specified in the said Explanation, the cultivating tenant shall be entitled to restoration of possession."

This sub-clause also throws light on the type of dispossession or ceasing to be in possession which is referred to as " not in possession thereof " in section 4 (1). Provision is made in the proviso only for a *cultivating tenant-applicant who was evicted*, but nothing is said as regards a cultivating tenant who had surrendered possession of the land. It cannot be that in the case of tenants who relinquished or surrendered possession of the lands voluntarily, the exceptions or reservations applicable to unjustly evicted tenants would not apply. It cannot be that tenants who had voluntarily relinquished or surrendered possession of their holdings were intended to be placed on a better footing than tenants forcibly or unjustly evicted and to be relieved of all qualifications and conditions as regards the restoration to possession applicable to the other class.

Lastly we might also refer to the language employed in section 4 (4) (ii). Sub-section (4) deals with the procedure to be followed by the Revenue Divisional Officer on the receipt of an application for restoration to possession under section 4 (1) and sets out the conditions which might be imposed in directing restoration. The conditions are thus stated :

> " In passing an order allowing the application the Revenue Divisional Officer may impose such conditions as he may consider just and equitable including conditions in regard to
>
> (ii) the reimbursement by the applicant of the landlord or the other cultivating tenant in respect of the expenses incurred or the labour done by him during the period when the applicant was not in possession, on any crop which has not been harvested . . . ."

It would be noticed that the last provision uses the word " when the applicant was not in possession " words similar to those occurring in section 4 (1) with which we are concerned. There can be no doubt that section 4 (4) (*ii*) deals with the case of evicted tenants *vide* section 4 (2) who, therefore, were not in possession at the date of the Act, notwithstanding the use of the expression " not in possession " without specific reference as to how they ceased to be in possession. It would therefore be not unreasonable to hold that the words in section 4 (1) should also be similarly construed. These provisions undoubtedly support the learned Advocate-General in the construction of section 4 (1) which he invites us to adopt.

The resulting position might be expressed thus. Section 4 (1) confers rights on a class of tenants and uses very general language to designate the persons comprehended within its scope. If the other portions of the enactment contained provisions expressly narrowing the scope of the perfectly general words in section 4 (1), the rule of construction would undoubtedly be to reconcile the two portions and hold that the general words in section 4 (1) were to be read as qualified. This qualification however need not be by words of the enactment expressly referring to the words in section 4 (1). The other sub-sections of section 4 enact the machinery for implementing the benefits declared or conferred by sub-section (1). Normally, therefore, the machinery provisions would be co-extensive with and cover the same field as the declaratory or right-conferring provision. In the event of the words of these two sets of provisions not being co-extensive—or the one being more extensive than the other—two constructions are possible of being adopted: (1) To read the words of machinery provisions in such a manner as to take in every situation comprehended by the right-conferring provision or (2) to read the right-conferring provision as limited to those situations which are covered by the machinery provision. The alternative to be adopted to any particular context would wholly depend on the scheme of the enactment generally, as also whether having regard to language employed, it is possible to read down the declaratory words or read up the words in the machinery provision. Having given the matter our best consideration, we are of the opinion that the general words in section 4 (1) must in the context, be read as if it ran " who by reason of an eviction is not in possession thereof at the commencement of the Act ". The question however still to be considered is as regards the import of the expression " evict " in section 4 (2).

But before dealing with this matter, we shall refer to other provisions of the enactment which, in our opinion, not only reinforce the interpretation we are placing on the relevant words of section 4 (1) but also throw light on what the framers of the enactment meant to conveny by the word " evict ".

The other provision we have in mind is section 3. While section 4 gives what one might term a retrospective operation to the statute, section 3 is the prospective provision. In regard to tenants on the land at the date of the enactment guarantee conferred by section 3 (1) is that they would not be " evicted from their holdings by or at the instance of the landlord ". It enacts :

> "3 (1).—Subject to the next succeeding sub-sections, no cultivating tenant shall be evicted from his holding or any part thereof, during the continuance of this Act, by or at the instance of his landlord, whether in execution of a decree or order of a Court or otherwise."

Before leaving this sub-section we might point out that section 3 does not prevent a tenant from relinquishing his holding or surrendering his tenancy to the landlord or giving up possession voluntarily at the end of the term. What it is designed to prevent is some hostile act on the part of the landlord by which the tenant is deprived of possession. The preamble to the enactment which recites the necessity " to protect cultivating tenants in certain areas in the State of Madras from unjust eviction " obviously uses the expression " eviction " as meaning a dispossession of a tenant " by or at the instance of the landlord ". If this is the meaning of eviction in the preamble which is carried out by the provisions of section 3, normal rules of construction would appear to point to the expression connoting the same idea when it occurs in section 4 (2), as in the absence of clear words, a retrospective provision would not be held to be of wider amplitude than the prospective.

Apart from the indications we have adverted to and the light thrown by the use of the words " by or at the instance of the landlord " in section 3 (1), the same conclusion is reached by an examination of the meaning of the expression " eviction " as understood by Courts. The word has not been defined in the statute. Its meaning has therefore to be ascertained with reference to dictionaries as well as the decisions where the concept involved has been discussed. Wharton defines eviction as " dispossession " which certainly does not help us much. Possibly the best exposition of the subject is to be found in the judgment of the Court of Common Pleas in *Upton* v. *Townend*[1]. It is not necessary for the purpose of the present case to refer to the facts of that decision, but it is sufficient to extract the meaning of the word as found in passages in the several judgments in the case. Jervis, C.J., during the course of the argument said :

> " I think if a landlord went and took out the windows of a house with the intention of turning the tenant out, the jury would be of opinion that that was an eviction ".

This shows that it is not necessary for an eviction to be an act in the law but it is sufficient if a hostile act of the landlord led to the dispossession. In the course of his judgment the learned Chief Justice said :

> " What an eviction is it is difficult to define with technical accuracy. The word ' eviction has in later times been understood to mean what formerly it was not intended to express. . . .

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[1] 25 Law Journal (Common Pleas) 44.

> . . . . . "Eviction" from *evincere*, to evict or dispossess by course of law, was used originally when the person having the permanent title asserted it, and expelled his tenant . . . . . The word 'eviction' has come to have a popular meaning, and to be applied to every kind of *expulsion* in fact. Now, getting rid of the old notion of an 'eviction', it may be taken to mean, not a mere trespass without anything more, because, though every eviction implies a trespass, every trespass does not amount to an eviction, but something of a more permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the whole or part of the demised premises. It is for the jury to say whether the act was done by the landlord, and whether it was done with the intention of depriving the tenant of the enjoyment."

Williams, J., expressed himself thus :

> "It is curious that there is so little to be found in the books, which is definite and precise, as to what amounts to an eviction. A particular act may be a mere trespass, or may amount to an eviction, according to the intention of the party who does it and the result of such cases as can be found is, that acts will amount to an eviction, if done with the intention, with respect to any part of the premises demised, that the tenant should not hold".

To a similar effect was the conclusion of Crowder, J., who said :

> "The word 'eviction' has received no precise definition as employed with respect to the acts of a landlord towards his tenant . . . The question here is, whether there has been an expulsion or putting out by the landlord from part of the premises. . . . an expulsion or a privation of the occupation of the premises as demised."

Willes, J., who was the other learned Judge who constituted the Bench said that he understood by the expression 'eviction' :

> "an act of a permanent character done by a landlord, as has the effect, substantially, or preventing his tenant from enjoying what was demised to him, or any part of it . . . . and it need not be done by going on the land and putting the tenant out. The ancient authorities collected in Viner's Abridgement show that it is not necessary that there should be an actual bodily expulsion to constitute a disseisin".

There is nothing in the later authorities to modify the view expressed by the learned Judges in *Upton* v. *Townend*[1]. We consider that "eviction" as used in section 3 (1) and section 4 (2) is an eviction of this character and that in cases where the tenant surrenders possession voluntarily without being compelled to do so by any act or conduct on the part of the landlord, there is no eviction. It is not our purpose to define exhaustively the acts or conduct on the part of a landlord which constitute eviction. It is sufficient for our purpose to say that there would be no eviction when a tenant voluntarily and willingly surrenders possession of the land to the landlord. So far as the present case is concerned, the admitted facts and the finding of the Revenue Divisional Officer are that the surrender was for consideration and was a result of a bargain freely and voluntarily entered into between the parties. In the circumstances there was no eviction of the first respondent from the holding which he formerly held. In view of our construction of section 4 (1), that it contemplates restoration to possession only of cultivating tenants who were in possession of their holdings on 1st December, 1953, but who ceased to be in possession at the date of the commencement of the Act by reason of an eviction as specified in the several provisions which we have already pointed out, it follows that the first respondent was not entitled to an order for restoration to possession under the provisions of section 4.

Learned counsel for the first respondent placed some reliance on the decision of one of us in W.P. 492, etc., of 1953 where the question of the construction of section 6 (1) of the Tanjore Tenants and Pannayals Protection Act, (Act XIV of 1952) came up for consideration. In that Writ Petition it was held that a tenant, who had surrendered possession of the holding between 1st December, 1951, and the commencement of that Act, 23rd August, 1952, could be restored to possession under section 6. Though there is some similarity between the language of section 6 (1) of Act XIV of 1952 and section 4 (1) of the present enactment, the absence in the Tanjore Enactment (Act XIV of 1952) of the reference to the applicant under section 6 as an evicted person, in the machinery sub-sections of section 6 of Act XIV of 1952 renders that decision inapplicable to, or to afford any guidance for, the interpretation of section 4 of the Act XXV of 1955.

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[1] 25 Law Journal (Common Pleas) 44.

In the view which we have expressed above, the order under section 4 restoring the first respondent to possession was without jurisdiction and is therefore liable to be set aside. W. P. No. 576 of 1956 succeeds and the rule already issued is made absolute. The order of the Revenue Divisional Officer is quashed. The petitioner will be entitled to his costs. Counsel's fee Rs. 100.

In view of our allowing W. P. No. 576 of 1956, W.P. No. 577 of 1956 has become unnecessary. Since, however, the petition has been argued in full, we shall state our conclusions as regards that petition also. The matter arises this way. Under section 4 (2) (*i*) of the Act a cultivating tenant who satisfied the conditions of section 4 (1) is not, however, entitled to an order for restoration to possession if he was in possession either as owner, or as tenant or as both, of land exceeding 6-2/3 acres of wet land or dry land irrigated from any Government source of irrigation, which shall be taken to be equivalent to 20 acres of dry land not irrigated from any Government source of irrigation. In the application for restoration which the tenant filed the tenant specified 'nil' against column 9 of the application, which was in the form prescribed by rules as regards the extent of the land possessed by him. He amplified this statement in paragraph 14 he had not been assessed to any sales-tax, profession-tax or income-tax for the years 1953-54 and 1954-55. The present petitioner denied this in the counter which she filed and in paragraph 8 stated :

> "This respondent learns that the petitioner had been on the date when the Act came into force in possession of more than the extent of lands referred to in explanation, sub-section (2) of section 4 of Act XXV of 1955 as the owner. Hence the present application is unsustainable."

The tenant examined himself before the Revenue Divisional Officer and in the course of his evidence he stated :

> "I have my father. We have 20 acres of kadu. I am not cultivating them. My father is cultivating them. I am separated from my father. There is no partition deed. No lands were given to me. I partitioned in 1947. I have no record to show that there was partition. 20 acres is made up of 10 acres of kadu and 10 acres of thottam."

It was, therefore, clear that even on this evidence the family of which the tenant was a member owned 20 acres of land of which 10 acres were garden land. The tenant alleged a partition but produced no evidence in regard to it which was certainly a matter within his own knowledge. The Revenue Divisional Officer disposed of this defence thus :

> "It was sought to be contended that the petitioner was in possession of 20 acres of lands and so was not entitled to restoration. The petitioner admitted that his father has 10 acres of dry land and 10 acres of thottam but stated that he is not in possession of them as he had already become a separated member. The defence has not rebutted this statement."

The learned Advocate General's grievance is as regards the last sentence in the above passage, on the basis of which the officer has held that the tenant's case had been proved. In our opinion the complaint of the learned Advocate-General is well founded. The question as to whether the tenant owned or possessed lands beyond the maximum prescribed by section 4 (2) is a matter for evidence. But in the present case the tenant admitted that his family was possessed of more than the maximum. It was for him to have proved by acceptable evidence that he had ceased to be the owner or or ceased to have any right to the extent of land beyond that prescribed by section 4 (2). Certainly it was not for the landlord to establish this fact. In our opinion, the order of the officer passed on a finding reached by casting the burden on the landlord, in the circumstances of the case, cannot be supported. If we had reached a conclusion adverse to the landlord in W. P. No. 576 of 1956, we would have made the rule in W.P. No. 577 of 1956 absolute and directed the officer to conduct a proper enquiry and adjudicate upon whether the tenant fell within the exception or not. In view, however, of our order in W.P. No. 576 of 1956 we will dismiss the W. P. No. 577 of 1956 without costs and with the remark that it is unnecessary to pass any orders in it.

R.M, *Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI.

Thangachi Nachial *alias* Shaik Ali Nachial and another .. *Appellants**

v.

Ahmed Hussain Malumiar and others .. *Respondents.*

Private trust—Fraudulent and collusive alienations by trustees—Who can maintain an action for recovery of possession—Representative suit under Order 1, *Rule* 8, *Civil Procedure Code* (*V of* 1908)—*If necessary—Limitation—Limitation Act* (*IX of* 1908), *Articles* 144 *and* 12—*Applicability.*

The plaintiff, a beneficiary, interested in the trust and also an heir entitled to be appointed as a trustee under the terms of the trust in certain circumstances is clearly entitled to maintain an action for recovery of possession, though any recovery of possession ordered in his favour can only be on behalf of the trust. It is not necessary that a representative suit should be filed with the permission of the Court under Order 1, rule 8 of the Civil Procedure Code.

Article 12 of the Limitation Act will not apply since the sales have been brought about by fraud and collusion and as such can be ignored. The proper article to apply would be Article 144 of the Limitation Act.

Appeal against the decree and judgment of the Court of the Subordinate Judge, Mayuram, dated 3rd December, 1951 and made in O.S. No. 77 of 1951.

S. Thyagaraja Ayyar, for Appellants.

S. Ramachandra Ayyar, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This is an appeal preferred against the decree and judgment of the learned Subordinate Judge of Mayuram in O.S. No. 77 of 1951.

The facts are: Muhammad Abdul Kadir Malumiar created a private trust on 19th November, 1918, *i.e.*, subsequent to the Mussulman Wakf Validating Act of 1913. The Wakf comprised of 12 acres 80 cents of land near Nagore, portion of a house bearing door No. 3 in Nagore Town, and cooking-vessels, etc., mentioned in wakf deed. The trust was created for the purpose of meeting the expenses of a Mouluth to be performed in the month of Rabiul-avul when 40 marakals of rice should be cooked and distributed to relatives, friends and the poor and another Mouluth to be performed in the Mohurram month of each year in the Hussainia Moulatkhana belonging to the settlor when 25 marakals of rice have to be cooked and distributed to poor Muslims. This poor feeding is a valid object of a wakf: Baillie (1) 550 ; Hidaya 240 ; *Fatma Bibi* v. *Advocate-General of Bombay*[1], *Asoobai* v. *Noorbai*[2], *Kuttayan* v. *Ravuthan*[3]. The vessels were for use on those occasions and it is provided that at the time of the Mouluths the entire house referred to above was to be vacated by the persons occupying the portion. The expenses have to be met from out of the income of the lands after paying the melwaram due to the Nagore Durgah. The wakf deed also provided that three-fourths of the net income from the lands was to be spent for the trust, but, in order to provide for the due performance of the trust, in years when there may be a failure of crops, a reserve fund was to be kept sufficient to enable the trust being performed for one year ; and, subject to the said provision being made for the regular performance of the charity every year, one-fourth of the income was to be distributed among the founder's santhathi, male and female. The first defendant, the eldest son of the dedicator, and the second defendant, his son-in-law were constituted trustees, but after them or even during their lifetime, any santhathi of the settlor, who was a male, who was a proper person, and who was capable of performing the charity, could be the trustee. And, any trustee, who misconducted himself, could be removed from office, at the instance of a santhathi of the settlor. There are other terms prohibiting alienations and gifting of the wakf property and for building up of reserves. Thus this was a permanent dedication by a Muslim of properties partially for the maintenance and support of his family, children and descendants and for purposes recognised by Musalman Law, religious, pious or charitable. *Syed Ahmed* v. *Juliha Bivi*[1], (Patanjali Sastri and Bell, JJ.) A.S. 92 of 1945 High Court (to which Govinda Menon, J., was party); *Abdur Rahim* v. *Narayan Das*[2], *Mahommed* v. *Amar Chand*[3], *Abdul Fata* v. *Rasmaya*[4] *Alima Ammal and others* v. *Mohammed Hussain Marcair and others*[5], (Govinda Menon and Chandra Reddi, JJ., dated 27th March, 1951, where a similar wakf by a Malumiar from East Tanjore came up for consideration).

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* Appeal No. 5 of 1952. 5th April, 1956.

1. (1881) I.L.R. 6 Bom. 42.
2. (1905) 8 Bom. L.R. 245.
3. (1911) I.L.R. 35 Mad. 681.

This Abdul Kadir Malumiar so long as he was alive was carrying out the terms of the wakf deed. Subsequently after his death, according to the plaintiff, what happened was as follows : The first and the second defendants colluding with the sixth defendant purposely allowed arrears of rent to the Nagore Durgah to accrue when the narja lands were fetching 130 kalams of paddy as the tenant's share, and a fraudulent revenue sale was held in 1939 and the bulk of the properties even then worth about Rs. 5000 and now worth Rs. 15,000 was sold for Rs. 401. This included a bungalow in item 1 and the tank which could not be sold for arrears under the Madras Estates Land Act. After the said revenue sale of the bulk of the properties, defendants 1 and 2 purported to convey by a private sale the remaining properties covered by the D and E Schedules to the plaint to the self-same auction purchaser, *viz*., Haja Abdul Hameed Sahib. This Haja Abdul Hameed Sahib died four years ago and the third defendant is widow and legal representative. This Haja Abdul Hameed Sahib in his turn purported to make a wakf of the properties which he had purchased, prescribing similar celebrations and made the fourth defendant his trustee. The fifth defendant is the daughter of the first defendant who has purported to gift to her a portion of the house No. 3 as stridhanam on the occasion of her marriage in September, 1946, entirely overlooking the terms of the wakf deed prohibiting any alienation or gift. In these circumstances the plaintiff, who is the son of the founder of the trust and is in the line of trustee appointed by the founder and interested in seeing that the properties are not lost to the trust and who is also a beneficiary of the surplus one-fourth which has to be distributed by the trustee amongst the heirs of the original founder, has filed this suit in 1951 in the pauper form alleging that on account of his suffering from mental illness he came to know of these alienations about one year prior to the filing of this suit, for the reliefs of directing possesion of the suit properties mentioned in B, C, D, E and F Schedules to the trust created by the plaintiff's father as per wakfnama, dated 19th November, 1918. The suit is stated to be not barred under section 10 of the Indian Trusts Act and that even otherwise it had been instituted within a year of the plaintiff's knowledge of the fraudulent alienations.

The contest raised by contesting defendants is reflected in the following issues:

(1) Did the whole of B, D and E Schedule properties belong to Muhammad Abdul Kadir Malumiar ?

(2) Is the sale in E.P. No. 27 of 1938 on the file of the Sub-Collector's Court liable to be set aside for any of the reasons set out in the plaint ?

(3) Was the C Schedule property not liable to be sold by the Revenue Court ?

(4) Is the sale of D and E Schedule properties to the third defendant's husband by defendants 1 and 2 valid and binding on the trust ?

(5) Has the plaintiff right to sue ?

(6) Is the suit, as framed, unsustainable ?

(7) Is the suit in time ?

(8) Is the suit barrred under section 47, Civil Procedure Code ?

(9) Is the suit barrd under section 92, Civil Procedure Code ?

(10) To what relief is the plaintiff entitled ?

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1. (1946) 2 M.L.J. 335.
2. (1922) 44 M.L.J. 624 : I.L.R. 50 Cal. 329 at 334 (P.C.).
3. L.R. (1889) 17 I.A. 28 : I.L.R. 17 Cal. 498 at 509 (P.C.).
4. L.R. (1894) 22 I.A. 76 : I.L.R. 22 Cal. 619 (P.C.)
5. Appeal No. 198 of 1946.

The learned Subordinate Judge found under issue 1 that B, D and E Schedules belonged to the trust excluding 2 acres 19 cents covered by Exhibit B-2; under issue 2 that, as the revenue sale was due to collusion and fraud between defendants 1 and 2 and Haja Abdul Hameed Sahib, the purchaser and that as the revenue sale held has been shown to be null and void, the sale in E.P. No. 27 of 1938 on the file of the Sub-Collector's Court was liable to be set aside for the reasons set out in the plaint; under issue 3 that the C Schedule property could not be sold by the revenue Court; under issue 4 that the private sale under Exhibit B-29 was clearly invalid; under issue 5 that plaintiff was entitled to maintain the suit, though recovery of possession can be ordered only in favour of and on behalf of the trust and which possession was accepted by the plaintiff; under issue 6 that the suit as framed is maintainable under issue 7 that the suit is not barred as it is governed by Article 144 of the Limitation Act when the revenue sale in favour of Haja Abdul Hameed Sahib has been found to be invalid from the very beginning; under issue 8 that the suit is not barred under section 47 of the Code of Civil Procedure; under issue 9 that the suit is not barred under section 92 of Code of Civil Procedure and under issue 10 that the plaintiff would be entitled to the following reliefs;

> "In the result, the suit is decreed in favour of the plaintiff, for recovery of possession, on behalf of the trust created under Exhibit A-1, of the plaint B, C, D, E and F schedule properties, excluding, however, the properties (2 acres 19 cents) delivered under, covered by and specified in Exhibit B-2 as against all the defendants. The plaintiff will have proportionate costs of suit from defendants 1 and 2 and the estate in the hands of defendants 3 and 4. Defendants 1, 2 and 4 will pay the Court-fee payable on the plaint, proportionate to the success of the plaintiff, to the Government; and, the plaintiff will pay the balance of Court-fee due to the Government. . . . . . ."

The defeated defendants 3 and 4 have preferred this appeal.

On a review of the entire circumstances of the case, we have come to the same conclusion as the learned Subordinate Judge on all the three points which were pressed before us, *viz.*, that the plaintiff is not entitled to maintain the suit; secondly, that the revenue sale was held properly and cannot be set aside; and thirdly, that the suit is barred by limitation. Here are our reasons;

Point 1: That the plaintiff can maintain the suit as it stands framed can admit of no doubt whatsoever. Under the terms of Exhibit A-1 the plaintiff is entitled to share in the surplus one-fourth remaining after the performance of the charities. So he is certainly a beneficiary within the meaning of section 3 of the Indian Trusts Act, 1882, *i.e.*, one of the persons for whose benefit the confidence is accepted by the trustee from the author of the trust. Secondly, under the terms of Exhibit A-1 during the lifetime of defendants 1 and 2, if there was a proper male issue of the founder capable of management, he can be a trustee. It follows, therefore, that if defendants 1 and 2 were to be removed from the trusteeship, which is the only possible result of out confirming the decree and judgment of the Lower Court, this plaintiff would be entitled to become a trustee.

The law relating to suits for recovery of wakf property has been summarised by K. P. Saxena (Muslim Law, III Edn., 1954) as follows:

> "A worshipper can enforce his individual right in connection with a mosque, but he cannot sue for the recovery of an unauthorised alienation of wakf property; the mutawalli alone can have the right to institute a suit for its recovery: *Debendra Nath Mitter* v. *Sheikh Safatulla*[1]. A Mutawalli can maintain a suit for recovery of possession of the wakf property against a trespasser although it does not vest in him. A representative suit by two worshippers to set aside an alienation by the mutawalli, is, however, maintainable even without the sanction under section 92 of the Civil Procedure Code, or section 14 of the Religious Endowments Act: *Azhrof Ali* v. *Mahomed Nurojomma*[2]; *Noor Mohammad* v. *Karima Bibi*[3]. The wakf property may, like other trust properties, be recovered from third persons under circumstances referred to in the Indian Trusts Act, Section 63. In case of an unlawful alienation or a mortgage of the mosque property by its manager, any person interested may seek remedy in a Civil Court and restore the property to the trust, and the same is true also in case where wakf property is auctioned in execution of a decree not binding on the trust; *Afiman* v. *Hamiduddin*[4]; *Mahomed Ghouse* v. *Moideen Siddikh*[5]; *Hamiuddin* v. *Court of Wards*[6]".

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1. A.I.R. 1927 Cal. 130.
2. (1918) 23 C.W.N. 115.
3. (1915) 27 M.L.J. 270.
4. (1919) 58 P.W.R. 1919 : 51 I.C. 799.
5. 18 M.L.T. 48.
6. (1913) 18 I.C. 319.

The principles which regulate the right to institute suits in relation to trust properties are well settled as pointed out by Venkataramana Rao, J., in *Ahmed Kutty* v. *Ayithraman Kutty*[1]. "Where there is a lawful trustee for an institution, he is the person competent to institute a suit in relation to the property of the institution, to take the necessary steps for safeguarding and preserving it and to eject a trespasser and recover possession thereof for the trust, but the recovery of the property is only for and on behalf of the institution which he represents. But where a trustee has alienated the trust property and therefore would not proceed to recover possession of the same or has disabled himself otherwise from maintaining a suit in respect thereof or declines to institute a suit, it cannot be said that the institution is without a remedy. The worshippers, who are the beneficiaries entitled to participate in the benefits of the institution, are entitled to maintain a suit for preserving the trust property or restoring the property to the trust either by instituting a suit for declaration or for an injunction or even for possession; but whether the worshippers are entitled to claim all or any of the reliefs which a trustee is entitled to do in a properly framed suit would depend on the circumstances of each case. It is desirable and necessary to make the trustee a party to the suit, and where he is made a party it is open to the Court to mould the relief as the circumstances may require. If the suit is one brought for possession by the worshippers the Court can, after declaring the property to be trust property and setting aside the alienation, direct delivery of possession to the trustee. In cases where there is no trustee, it is open to the Court to direct delivery of possession to the worshippers on behalf of the trust; *Rangaswami Naidu* v. *Krishnaswami Aiyar*[2]. Again, in certain circumstances it is competent to the worshippers to maintain an action for a declaration that a certain property is trust property and for an injunction restraining the defendant from interfering with their right of worship, which is a personal right, without making the trustee a party to the suit. This would not offend the principle that a trustee alone is competent to maintain a suit to eject a trespasser ; *Kuvarbai* v. *Mir Alam Khan*[3]." Even a worshipper can recover possession of trust properties on behalf of the trust so that when proper proceedings are instituted for the management of the trust property and a trustee is appointed, he might hand over possession to the trustee. The general principle applicable to Muslim Wakf is the same as that applicable to the property of a Hindu idol. The rule of Hanafi Law that Wakf property is taken to have ceased to be held in human ownership is applied to all such property even if the wakf be a wakf-alal-aulad or wakf for the benefit of the descendants; *Muhammad Jafar* v. *Taqi Khan*[4]. So when a wakf property is unlawfully alienated any person interested in the objects of the wakf may institute a suit to set aside the alienations and for the enforcement of the provisions of the wakfs, *Kazi* v. *Balkrishna*[5].

In this case the plaintiff is not a mere worshipper but an actual beneficiary interested in the trust and what is more an heir entitled to be appointed under the terms of the trust deed as a trustee in certain circumstances. Therefore, this plaintiff is clearly entitled to maintain the suit, though any recovery of possession ordered in his favour can only be on behalf of the trust. The beneficiary's right to sue embodied in section 59 of the Indian Trusts Act, 1882, is an illustration of the maxim "A trust shall not fail for want of a trustee": Halsbury's Laws of England, Hailsham edition, Volum XXXIII, Pages 134-135 and authorities cited therein; Lewin on Trusts, 14th Edition, P. 723.

Turning to the other branch of the argument, it is not necessary that a representative suit should be filed with the permission of the Court under Order 1, rule 8 of Code of Civil Procedure. The plaintiff himself can file a suit and recover posession on behalf of the trust. In *Maulavi Muhammad Fahimul Huq* v. *Jegat Ballay Ghosh*[6], which was a case of Muhammadan Wakf, it was held that the beneficiary of a trust, in respect of a Muhammadan Wakf, interested in the maintenance of a mosque or other charitable institution, may, without having recourse to Order 1, rule 8, Code of Civil

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[1] (1937) 2 M.L.J. 301.
[2] (1922) 44 M.L.J. 116.
[3] (1883) 7 Bom. 170.
[4] A.I.R. 1933 Oudh 517.
[5] (1899) 24 Bom. 170.
[6] (1923) 2 Pat. 391.

Procedure, and without suing in a representative capacity, on behalf of the other beneficiaries, sue for recovery of possession of property, wrongfully alienated by the trustee, and for the incidental declaration that the properties are the subject of the trust and that they cannot be alienated. The beneficiary has the right under section 59 of the Indian Trusts Act subject to the provision of the instrument of trust that the trust property shall be properly protected and held and under section 63 follow the trust property into the hands of third persons. The savings of the rights of transferees are embodied is section 64 Indian Trusts Act. Therefore Point 1 has been rightly decided in favour of the plaintiff.

Point 2.—This rent sale has undoubtedly been brought about by fraud and collusion between defendants 1 and 2 and the sixth defendant and was a regular hole-and-corner affair without observing the mandatory provisions of section 117 of the Estates Land Act. These are proved by the following circumstances. The lands in question, nanja and punja with a building and tank, were undoubtedly fetching on an average 130 kalams per year; *see* Exhibits B-31 and B-27 and the evidence of D.W. 4. Defendants 1 and 2 have not gone into the box to give their own version regarding the income from the properties. On these lands the melwaram of 42 kalams was payable to the Nagore Durgah and 10 kalams to the Perumal temple. Therefore, there was not less than a surplus of 60 kalams per year for the performance of the charities which were nothing more than two feedings of the poor on two occasions in a year which would not have required more than 16 kalams of paddy. It is clear therefore that defendants 1 and 2 with ulterior objects of their own were allowing the arrears to accrue in order that the lands might be sold in collusion with another to ensure secret benefit to themselves. Secondly, that these defendants 1 and 2 were making preparations for this *mala fide* rent sale is evident from the testimony of P.W. 2. P.W. 2 states that in the year 1938, prior to 1939, one Syed Mohideen came to him and asked him to bid for the property benami for the benefit of defendants 1 and 2, that he actually did so and that subsequently the sale was set aside on deposit by Muhammad Gani Nachiar. Exhibits A-7 and A-8 show the refund of the amount on 19th July, 1938, to P.W. 2, who says that he deposited the total amount of Rs. 390 and odd in his Kumbakonam Bank account as evidenced by Exhibit A-10. He also swears that when the sale was set aside on deposit by Muhammad Gani Nachiar, who filed her petition, Exhibit B-5, Syed Mohideen came to him and he gave him back Rs. 60 cash and also a cheque as shown by Exhibit A-9-*a*. Exhibit A-9-*a* and A-10-*a* corroborate the evidence of P.W. 2. The testimony of P.W. 2 shows that in the next year also there was an attempt to make him take the property in revenue sale benami for the benefit of the first and second defendants as Hajee Abdul Hamid wanted a larger profit. This witness states that he refused to fall in with their wishes this time as he seems to have felt compunction about this spoliation of wakf properties dedicated to charity. This witness whom the learned Subordinate Judge has seen in the box has been believed by him as a person of means who had purchased properties under Exhibit A-11. Then we have the evidence of P.Ws.4 and 5. According to P.W.4 defendants 1 and 2 approached him in 1939 before the disputed revenue sale as they wanted to resort to a device to be able to deal with the charity properties and they wanted him to create a revenue sale being taken in his name and that he refused to fall in with their wishes. Then we have the evidence of P.W. 5, a broker, who states that defendants 1 and 2 wanted him to raise a loan on the security of the properties, that he went and asked one Pakiri Sultan Maraikayar on behalf of defendants 1 and 2, but that person refused to advance any loan as the properties were wakf properties. This witness adds that subsequently defendants 1 and 2 told him that they had allowed the properties to be sold in rent sale and some amounts were due from Hajee Abdul Hameed Sahib the purchaser and requested this witness to go and get the balance from that Hajee Abdul Hamid. On witness enquiring Hajee Abdul Hamid he was told that there might be some balance and that he will pay up. In other words, the testimony of P.Ws. 2, 4 and 5, which has been accepted by the learned Subordinate Judge, clearly shows the preparation made by defendants 1 and 2 to get these properties sold in revenue sale with a collusive auction-purchaser in order to obtain secret benefit to themselves. Subsequent to this sale we have the significant fact that no endeavour has been made by defendants 1 and 2 to raise and deposit money to set aside the sale, which is consistent only with the sale being a collusive and fraudulent one. This receives corroboration from another significant circumstance that not only did defendants 1 and 2 make no endeavour to get the sale set aside but they even sold the remaining properties of the trust under Exhibit B-29. dated 24th June, 1939, which is sometime prior to the date of the sale certificate Exhibit B-11, dated 5th July, 1939, for Rs. 300 reciting that as the bulk of the properties had been sold away in auction and the remaining properties, were insufficient for proper performance of the charity, the trustees were selling the remaining properties. It is stated that the learned advocate who appeared for defendants 3 and 4 found this too much on this being pointed out to him and frankly conceded that he could not at all support the sale Exhibit B-29 in the face of the express provision in the wakf deed, Exhibit A-1. It need not be pointed out that if mutawalli transfers property without any authority of the wakf or the Court the alienation is void and he is guilty of committing a breach of trust for which he may be removed: *Ahmed Shah* v. *Attah Khan*,[1] *Shama Churn* v. *Abdul Kabeer*[2], *Mahim Jan Bibi* v. *Mir Rahim*[3], *Jabeda* v. *Mahomamed*[4], *Badal* v. *Tinkori*[5], *Abdur Rahim* v. *Narayan Das*[6], *Abdul Rajak* v. *Ali Baksh*[7]. This receives further corrobortion from another circumstance that the first defendant has gifted the *F* Schedule properties to his daughter, when there is an express provision in Exhibit A-1 against gifting or alienating wakf properties. These defendants 1 and 2 remained *ex parte* throughout. There can be no doubt in these circumstances that defendants 1 and 2 had got hold of the sixth defendant in order to dispose of these trust properties and this collusion is finally shown from the fact that documents Exhibits B-5 and B-10, which should be in the custody of the second defendant came from the custody of the contesting defendants 3 and 4. It has been argued that this Hajee Abdul Hameed is a stranger, therefore no fraud could be inferred. But it should not be overlooked that in the very nature of things, as has been repeatedly pointed out, fraud is secret in its origin and inception and the means adopted for its success and fraudulent motive or design cannot be proved to the very hilt and that it should be inferred from the circumstances placed before Court. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan. In addition to the circumstances pointed out above which show collusion between defendants 1 and 2 and Hajee Abdul Hameed, we have the further fact that the circumstances and the manner in which the revenue sale was held show that the acution-purchaser must also have been a party thereto. There was no publication in the Gazette as required by the mandatory provisions of section 117 of the Estates Land Act : *See* Exhibits A-5 and A-14. The defendants have filed only a publication after the sale as per Exhibit B-25. Secondly, there was no appointment of a selling officer ; *see* Exhibits A-12-*b* to A-12-*h*. Thirdly, for a paltry arrears of Rs. 100 and odd, the entire B Schedule properties were brought to sale : *see* the suit register extract, Exhibit A-4.It is extremely unlikely that this Hajee Abdul Hameed would have been a genuine auction-purchaser when the sale took place under such circumstances and what is more in a hole and corner fashion inside the house of the village munsif. The properties are found from their extent and income to be worth at least Rs. 2,000 then and now must be worth much more. According to the P.Ws. the properties were worth Rs. 5,000 in May, 1939 and it is significant to note that in Exhibit A-1 of the year 1914 the properties are stated to be worth Rs. 5,000. It is a well known fact that in wakf documents, to escape stamp duty, there will be only under-valuation and not over-valuation. We have already alluded to the net income of the properties and their extent. The fact that they have been knocked off for a sum of Rs. 401, is eloquent testimony of the fraudulent and collusive character of the sale. Therefere, the learned Subordinate Judge came to the correct conclusion that this sale, null and void from the very beginning, was brought about byfraud and collu-

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1. A.I.R. 1934 Pesh. 57.
2. (1898) 3 C.W.N. 158.
3. A I R. 1925 Cal. 435.
4. A.I.R. 1926 Cal. 322.
5. (1917) 41 I.C. 736.
6. (1922) 50 Cal. 329: 44 M.L.J. 624 (P.C.).
7. A.I.R. 1946 Lah. 200.

sion between defendants 1 and 2 on the one hand and Hajee Abdul Hameed on the other hand.

Point 3.—It is contended by the learned advocate for the appellants that Article 12 of the Indian Limitation Act would apply to this case and that this suit has been filed long after the sale was confirmed and the sale certificate was issued. In advancing this argument it is overlooked that Article 12 applies to suits to set aside sales referred to therein. A sale can be set aside by a person only if it is said that it is binding on him unless and until it is set aside. This Article will not therefore apply to cases where the plaintiff would not be bound by the sale even if it were not set aside. Now a person may not be bound (i) either because he is not a party to the decree or proceeding in which the sale is held, or (ii) because the sale itself is null and void and without jurisdiction. In the first case the sale cannot in fact be set aside by a third party because as between the parties to the decree or other proceeding the sale will be valid and binding. In the latter case there is nothing to be set aside. The plaintiff in such a case can get a declaration that the interests of the trust are not affected by the sale. In fact it has been held that even if the plaintiff sues to set aside such a sale it will be regarded as being in effect a suit for such a declaration. Such a suit for a declaration is not governed by Article 12. Further, in such a case the plaintiff can ignore the sale. The only restriction is that the purchaser should not have prescribed title by adverse possession and limitation for over the statutory period of 12 years after getting possession of the property. Therefore, the proper Article to be applied in this case is Article 144 of the Limitation Act and this is evident from the following Madras decisions : *Venkateswarlu* v. *Veeraswami*[1], (Case under Madras Estates Land Act) *Satyanarayana* v. *Rayalamma*[2], *Lakshmadu* v. *Ramudu*[3], *Venkata Narasiah* v. *Subbamma*[4]. See also *Rupa Jagshet* v. *Krishnaji Govind*[5], *Nasar Ali* v. *Kedarnath*[6], *Bulaqi Das* v. *Kesri*[7], *Mulk Rakj* v. *Nanak*[8], *Purnachandra* v. *Dinabandu*[9], *Ganashyam Chaudhary* v. *Basdebsha*[10], *Khairajmal* v. *Daim*[11], *Rambhai Govind* v. *Raghunath*[12], *Maharaj Singh* v. *Budhu Chamrar*[14].

The plaintiff also relied upon Article 95 of the Limitation Act. But having found that Article 144 applies and the suit is within time, it is unnecessary for us to canvass the merits of this claim because though there is some evidence that P.W. 1 on account of his mental illness was going from Duragh to Duragh and was not in a position to accurately comprhened the collusive and fraudulent sale which took place in 1939 there also is some evidence that P.W. 1 was always or frequently in Nagore and could not have escaped having knowledge of this revenue sale. It is unnecessay therefore for us to consider whether Article 95 of the Limitation Act would apply to this case.

The decree and judgment of the learned Subordinate Judge, however, require modification on two points, *viz.*, that we consider in the circumstances of this case, the decree should not be given to the plaintiff on behalf of the trust without making him firstly liable to reimburse the legal representatives of Hajee Abdul Hameed in a sum of Rs. 401 and secondly equating the interest and mesne profits up to the date of suit and thirdly permitting the legal representatives of that Hajee Abdul Hameed to establish in execution the value of improvements said to have been effected by them and set it off against the mesne profits subsequent to the date of suit and liable for the balance, if any, as this will shorten the litigation and avoid multiplicity of suits and save the trust funds and do complete justice between the parties. The plaintiff on behalf of the trust will take immediate possession of the properties and the question of accounting need not await the delivery of possession. To this course the plaintff and defendants can have no objection and have no objection. In regard to the extent of the property mentioned as comprised in Exhibit B-2 both sides agree that the decree mentioned 2 acres 19 cents whereas it ought to be 2 acres 67 cents. In assessing the quantum of mesne profits prior to the decree of the lower Court the amount spent under the wakf created by the third defendant on services prescribed under Exhibit A-1 will, as proved be given credit to.

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[1] (1946) 1 M.L.J. 291 : I.L.R. (1947) Mad. 28.

[2] (1943) 1 M.L.J. 386 : A.I.R. 1943 Mad. 501 : 213 I.C. 255.

[3] A.I.R. 1939 Mad. 867: I.L.R. (1940) Mad. 123 : 187 I.C. 816.

[4] I.L.R. (1881) 4 Mad. 178 (179).

[5] I.L.R. (1884) 9 Bom. 169 (172).

[6] I.L.R. (1897) 19 All. 308.

[7] A.I.R. 1928 All. 363: I.L.R. 50 All. 686.

[8] A.I.R. 1933 Lah. 10.

[9] I.L.R. (1907) 34 Cal. 811 (F.B.).

[10] (1921) 60 I.C. 529 (Patna).

[11] (1904) 32 Cal. 296: L.R. 32 I.A. 23. (P.C.),

[12] A.I.R. 1952 Bom. 106.

[13] A.I.R. 1952 Pat. 46,

Subject to these modifications the decree and judgment of the learned Subordinate Judge are confirmed and this appeal is dismissed, and the costs of both parties (plaintiff and defendants 3 and 4) including Court-fee both as awarded in the Lower Court and here will come out of the estate.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

N. Sundararaja Iyer .. *Petitioner**

v.

Sub-Collector, Dindigul and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 4—*Validity—If opposed to Article* 19 (1) (*f*) *and* (*g*) *of the Constitution of India* (1950).

It is true that a right to hold property includes a right to enjoy the same and any interference with the right of enjoyment will tantamount to interference with the right to hold property under Article 19 (1) (*f*) and (*g*) of the Constitution. But having regard to the pattern of tenancy legislation in this State for nearly half a century, *e.g.*, conferring occupancy rights on ryots in zamindaris by the Madras Estates Land Act and conferring fixity of tenure to verumpattamdars by the Malabar Tenancy Act and providing for fixation of fair rent, and having regard to the State policy as regards the economic pattern of society, the Madras Cultivating Tenants Protection Act, 1955, cannot be said to be opposed to Article 19 (1) (*f*) of the Constitution. It is a reasonable restriction within the meaning of Article 19 (5). The provisions of section 4 of the Act even though it savours of retrospective operation in certain respects, cannot be said to have exceeded the limits of reasonableness and is not repugnant to Article 19 (1) (*f*) of the Constitution and is in the interests of the general public. Nor is the enactment opposed to Article 19 (1) (*g*) and (6) of the Constitution and there is no irrational discrimination between one class of landlords as compared with others.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* or other appropriate writ or order calling for the records in C.T.P.A. No. 71 of 1955 on the file of the Sub-Collector, Dindigul and to quash the order, dated 17th April, 1956 and made therein.

A. V. Narayanaswami Iyer and *R. Venkatachalam* and *S. V. Subramaniam*, for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) on behalf of the State.

S. Mohan Kumaramangalam, K. V. Sankaran, V. Kumaraswami and *T. V. Srinivasachari*, for the second Respondent.

The Order of the Court was made by

Rajagopala Ayyangar, J.—The constitutional validity of the Madras Cultivating Tenants Protection Act (XXV of 1955) is challenged in this petition for the issue of a writ of *certiorari* to quash an order of the Sub-Collector, Dindigul, dated 17th April, 1956, who acting under section 4 of the Act directed the restoration of the second respondent, Rakkappan Servai, to the possession of certain lands belonging to the petitioner.

The land which forms the subject-matter of the dispute in the present proceedings is of an extent of about 3 acres situated in the village of Mannadimangalam in Nilakottai taluk. The second respondent claimed that he along with one Ayyaswami Pillai was jointly cultivating these lands under a lease deed executed on their behalf in favour of one Sadasivam Pillai. Their case was that the joint family of the petitioner and his elder brother was the owner of the land and that in or about May, 1953, the petitioner's elder brother Rajagopala Ayyar now deceased leased the lands to Sadasivam Pillai for a period of one year. Rajagopala Ayyar died in July, 1953 and since then the petitioner has been in management of this property on behalf of his family. The second respondent further stated that he was evicted from the lands in 1954 and one Sengiah Servai was inducted as a tenant. The second respondent filed an application under section 4 of the Cultivating Tenants Protection Act (which we shall hereafter refer to as the impugned Act), which enables every cultivating tenant, who was in possession of any land on the 1st December, 1953 and who is not in possession thereof at the commencement of this Act. (27th September, 1955) to obtain restoration of possession by application to the Revenue Divisional Officer. This right is, however, subject to certain exceptions set out in section 4 (2) of the impugned Act. But it is common ground that none of these latter applied to the second respondent or disabled him from obtaining the order.

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* W.P. No. 646 of 1956. 26th November, 1956.

Before the Revenue Divisional Officer to whom the second respondent made the application the petitioner contended that the tenant in cultivation of the lands in December, 1953, was not the second respondent or Ayyaswami but Sadasivam Pillai and that Sadasivam Pillai had voluntarily relinquished possession of the lands by May, 1954, he being then in arrears of rent and that the lands had thereafter been leased to Sengiah Servai who had been continuing in possession from 31st May, 1954, onwards. Evidence was led on behalf of the two parties and the Revenue Divisional Officer found that it was Rakkappa Servai, the second Respondent, who was in actual cultivation of the lands in 1953-54, that is, on the crucial date. On this finding the petition was allowed and the restoration of the second respondent to the lands in dispute ordered. It is the validity of this order that is challenged in this writ petition.

Two grounds have been put forward by learned counsel for the petitioner in challenge of the validity of this order of the first respondent, the Sub-Collector of Dindigul. The first was that the impugned Act and section 4 were repugnant to the fundamental rights guaranteed by Part III of the Constitution and were therefore unenforceable and the second, that the first respondent, officer, had failed to follow the procedure prescribed by section 4 (4) of the Act and that the order for restoration was consequently invalid.

We consider it convenient to dispose of the second ground first before dealing with the more important objection raised to this order. Section 4 (4) prescribes the procedure to be followed by the Revenue Divisional Officer on receipt of an application from a cultivating tenant who claims restoration to possession of the land of which he was in possession on 1st December, 1953. The sub-section runs thus :

> "S.4(4)—On receipt of an application under sub-section(3) the Revenue Divisional Officer shall after giving a reasonable opportunity to the landlord and the cultivating tenant, if any, in possession of the land, to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it. In passing an order allowing the application, the Revenue Divisional Officer may impose such conditions as he may consider just and equitable including conditions in regard to......"

We have already adverted to the fact that it was common ground that Sengiah Servai was actually in cultivation of the lands on the date of the application. In the application filed by Rakkappa Servai only the proprietors of the lands, that is, the petitioner and his brothers were made party respondents. The objection now raised to the order is that the Revenue Divisional Officer did not afford a reasonable opportunity to Sengiah Servai, the cultivating tenant in possession of the lands, to make his representations as required by section 4 (4) before disposing of the application. We have examined the records of the case and we find that this contention is without any basis. No doubt in the cause title to the application only the proprietors were impleaded as respondents but when they appeared before the Revenue Divisional Officer and filed their statement in which they stated that

Sengiah Servai was in possession, the Revenue Divisional Officer directed notice to this individual who appeared at the enquiry and was examined as a witness. It was after considering his evidence and the representations of Sengiah Servai that the present order was passed. This objection therefore is without force and is rejected.

Learned counsel for the petitioner urged four grounds in support of his attack on the validity of the impugned enactment. 1. Section 4 (1) compels an owner to restore a cultivating tenant to possession; this contravenes an owner's right to choose the person who shall cultivate his lands. Article 19 (1) (*f*) guarantees to all the citizens the right, *inter alia*, "to hold property". The right "to hold property" includes a right to choose the tenant. The law in question which compels a landlord to admit a tenant who was once in possession to be restored to possession against the will of the landlord is thus in violation of the freedom guaranteed by Article 19 (1) (*f*) and this is not saved by Article 19 (5) of the Constitution. 2. Section 4 is an unreasonable restriction on the right of a landlord to carry on a business or occupation of an agriculturist and is, therefore, repugnant to Article 19 (1) (*g*) which guarantees the freedom to carry on any occupation, trade or business. 3. section 4 (2) (*ii*) which draws a distinction between landlords holding 62/3 acres of wet land or its equivalent and those owning less extent of lands is discriminatory as regards the former and is founded on a classification which has no rational basis. 4. Section 6 which bars the jurisdiction of Civil Courts is violative of Article 14.

We shall now deal with each of these points separately. We shall first consider whether the provisions of section 4 (1) are repugnant to the freedom guaranteed by Article 19 (1) (*f*). Learned counsel for the petitioner urged that the freedom to "hold property" meant a right to enjoy property and that if there was any interference with the enjoyment of property it was tantamount to interference with the right "to hold property". To this extent learned counsel is supported by authority and even by the ordinary meaning attributable to the words of the Constitution. From this the next step in the argument was that the right to enjoy property involved a right to enjoy it in such manner as the owner chose including a right (*a*) of choosing his tenants and (*b*) of resuming personal cultivation. We are not disposed to quarrel with this import of the freedom guaranteed but the real question for consideration is whether the restrictions imposed on this freedom are reasonable as to fall within Article 19 (5) of the Constitution. Article 19 (5) saves the operation of any law "imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses (*d*), (*e*) and (*f*) either in the interests of the general public or for the protection of the interests of any scheduled tribe". The interests of any scheduled tribe are not involved in the present legislation and therefore what we have to consider is whether the provisions of the impugned enactment including section 4 are or are not a reasonable restriction on the right "to hold property" understood as above explained. In considering the reasonableness of this provision we have necessarily to take into account the economic background of the legislation as well as the fact that on the terms of section 1 (3) the Act would remain inforce for a period of one year.

Two matters have to be taken into account in dealing with this economic background of the impugned Act. The first is that afforded by the pattern of tenancy legislation in the State for nearly half a century. After a good deal of agitation on the part of tenants who were cultivating lands under zamindars and proprietors of estates the Madras Estates Land Act was passed in 1908 which conferred on tenants, considerable body of whom held under terminable leases, a permanent right of occupancy in the land. Section 6 of the Madras Estates Land Act (Act I of 1908) enacted :

> "6 (1).—Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding".

This right of occupancy was a heritable and transferable right and these ryots could be evicted from their holdings by suits before Revenue Courts and only on the ground "that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes" (section 151). For arrears of rent a landholder could only proceed to sell the holding which meant that the land would be cultivated by the purchaser as a ryot. There was no interference, however, with the ryotwari proprietors by legislation for sometime. The tenure in Malabar was peculiar, complete proprietorship vesting in the jenmi, who had unrestricted powers of eviction over cultivating tenants who fell into various categories and held on customary tenures of different grades. The Malabar Tenancy Act (Act XIV of 1930) gave fixity of the tenures to verumpattamdars and ensured them freedom from eviction except on stated grounds (section 10). Section 15 enabled an evicted verumpattamdar falling within certain categories to obtain restoration of possession by suit (compare also with section 21). These two enactments have been the subject of frequent amendments before the Constitution by which their scope has been progressively widened so as to embrace larger categories of cultivators. It is, therefore, clear that the right of a landholder to resume personal cultivation by evicting a tenant has been subject to regulations and restrictions by legislation stretching near half a century. Correspondingly there has been a conferment by statute of fixity of tenure to tenants. So much so that the duration of these tenancies is not fixed by contract but by law and the tenants cannot be evicted except on stated grounds. This antecedent history is certainly relevant in considering what society considers proper and therefore what the Legislature could treat as reasonable. We might also mention that both under the Estates Land Act and the Malabar Tenancy Act, there is provision for the fixation of fair rent so that the rent payable by a tenant is not to be rack-rent determined by contract but by what the Legislature considers as fair—fair to the landowner as well as to the cultivator.

Subsequent to the Constitution we have had the Tanjore Tenants Pannaiyal Protection Act (Act XIV of 1952) which prohibited eviction for a time and contained provisions for the restoration to possession of evicted tenants. It will be seen therefore that the impugned Act falls generally into the pattern of these several pre-Constitution enactments which is certainly a relevant factor for considering whether the restriction imposed is reasonable or not.

The other factor which we have in mind is the economic pattern envisaged by the two five-year plans particularly the second one which includes so far as land ownership is concerned four factors : 1. A ceiling on land-holding, in line with clauses (*b*) and (*c*) of Article 39 of the Constitution which enjoins on the State to direct its policy towards securing "(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ; and (*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

2. There should be a limit to which personal cultivation should be permitted. 3. The cultivators and cultivating tenants should have fixity of tenure. 4. The Rent payable for the use of the land by the cultivator should be fair. The precise content or even the form of the legislation has not been finalised though the second five-year plan has been published formulating these principles as those to be followed to achieve economic stability for the country.

The result of this uncertainty as regards the content and form of the intended legislation has been that the various classes of land owners as well as cultivators have been trying to queer the pitch by consolidating their position. This aspect of the matter is referred to in second five-year plan at page 185 thus :

> "During the past few years, there have been instances in some States of large-scale ejectment of tenants, and of 'voluntary surrender' of tenants. The main causes are ignorance on the part of the people of legislative provisions regarding security of tenure, possible lacunae in the law, inadequate land records and defective administrative arrangements. Most 'voluntary surrenders' of tenancies are open to doubt as *bona fide* transactions. It is recommended that action should be

taken to stay ejectment of tenants and sub-tenants except on ground of non-payment of rent or misuse of land. Ejectment of tenants and surrenders which may have taken place during, say, the past three years should be reviewed with a view to restoration wherever circumstances justify such a course. In order to discourage 'voluntary surrenders' of land under undue pressure, for the future, provision may be made that surrender of land by a tenant will not be regarded as valid unless it is duly registered by the revenue authorities. In such cases the landlord should be entitled to take possession of the land only to the extent of his right of resumption ".

This statement refers to the problem as it exists in the country in general. So far as this State is concerned, it was not immune from such activity and in the statement of objects and reasons of the Bill which became the impugned Act it was said :

> " It has been brought to the notice of Government that in anticipation of land reforms legislation owners of land are evicting cultivating tenants with a view to bringing the lands under their personal cultivation. Such large scale eviction will, if allowed to continue, lead to agrarian trouble and disturbance and to breach of peace. The object of this Bill is to protect the tenants from unjust eviction for a period of one year.
>
> A tenant will not however be entitled to protection if he is in arrear of rent or has done any act which is destructive of, or injurious to, the land or any crop thereon, or has ceased to cultivate the land or has used it for any purpose other than for which it was let. Suitable provision has been made for restoring land to any cultivating tenant who was in possession of it on the 1st December, 1954."

It may be mentioned that during the second reading of the Bill in the Legislature the date 1st December, 1953, came to be substituted for 1st December, 1954.

In view of the matters set out above we are unable to uphold the argument advanced on behalf of the petitioner that no emergency has been proved to exist to justify this interference with the rights of the landholder. Learned counsel urged that legislation similar to the impugned one contained in the Tanjore Tenants and Pannaiyal Protection Act (Act XIV of 1952) was sustained by this Court in *Santhanakrishna Odayar* v. *Vaithilingam*[1], as a reasonable restriction within Article 19 (5) of the Constitution by reason only of the existence of an emergency which called for such drastic curtailment of rights in property. It is true that the learned Judges when dealing with the constitutional validity of the Tanjore Tenants and Pannaiyal Protection Act did in part rest their reasoning on the two factors namely that it was a piece of temporary legislation and secondly that it was passed to meet an emergency. So far as the impugned Act is concerned, it is temporary and the statement of objects and reasons which we have extracted above shows that it has been passed to maintain the *status quo* pending permanent legislation. We are not however persuaded that this would not be an emergency which might justify a legislation of this type, nor are we satisfied that the only emergency which could justify a drastic curtailment of rights is one with an immediate possibility of danger to public peace, which is proved to exist as a fact before the Court.

Learned counsel for the petitioner next urged that the fact that the legislation is retrospective is an element to be taken into consideration in dealing with its reasonableness so as to conform to the requirements of Article 19 (5). As a general proposition this is unexceptionable but we are not satisfied that the retrospectivity has gone beyond the limits of reasonableness. Learned counsel for the petitioner further pointed out the distinction between the nature of the rights conferred by section 3 which might be loosely termed the prospective operation of the legislation and section 4 which is retrospective in character. He urged that under section 3 there could be eviction in the event of the tenant being in arrear as regards rent, and

> " being guilty of any negligence which is destructive of, or injurious to, the land or any crop thereon or has altogether ceased to cultivate the land; or having used the land for any purpose not being an agricultural or horticultural purpose; or willfully denied the title of the landlord to the land."

A tenant who has been evicted from his holding before the commencement of this Act and who falls within categories specified in section 4 is still entitled to restoration to possession. No doubt this is a serious objection but in our opinion it is not sufficient to render the right to restoration to possession conferred by section

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[1] (1953) 2 M.L.J. 325 : I.L.R. (1953) Mad. 1114.

4 unconstitutional. The eviction that is provided for by section 3 is an eviction through Court but the evictions that might have taken place between 1st December, 1953, the date referred to in section 4 and 27th September, 1955, the commencement of the Act might include evictions through force. The Act is designed to be enforced for a period of one year and if the right to restoration was to depend on the eviction being proved not to have been on grounds specified in section 3, the enquiry might well take beyond one year which constitutes the life of the enactment. If on these and similar grounds the Legislature considered it inadvisable and impracticable to have a judicial enquiry as regards the circumstances in which, a couple of years before the date of the application, an eviction took place, it cannot be said that the Legislature out-stepped the limits of reasonableness.

Learned counsel also urged that whereas under section 4 (2) a limit had been prescribed as to the maximum extent of other land to be owned or possessed by a tenant and other qualifying considerations imposed before a tenant could claim restoration, these had been wholly omitted from consideration when dealing with the future, under section 3. This again we consider is merely a legislative policy and if section 3 could be upheld as valid in the absence of section 4 (2) it cannot be rendered invalid by the enactment of conditions for restoration to possession.

Lastly it was urged that there was no rational principle behind the limit of 6 2/3 acres of wet land prescribed by section 4 (2). We are wholly unable to appreciate this argument. In our opinion it is based on a classification of bigger and smaller land owners and it has specified the reasonable extent of land which could be the subject of personal cultivation by the landlord himself. It is therefore based on a reasonable classification. Whether the extent ought to be 6 2/3 acres either more or less is matter of legislative policy with which the Court has no concern. The only consideration to be taken into account is whether the extent specified is so unreasonable as to render the classification itself without meaning, and this it is not.

Learned counsel for the petitioner faintly urged that the restriction imposed on the rights of the land owner in the present case, though it might be in the interests of cultivating tenants, was not in the interests of the general public and did not therefore conform to the type of restrictions contemplated by Article 19 (5). We are clearly of the opinion that there is no foundation for this argument which must be repelled. In the first place agriculture still forms the back-bone of the country's economy. It is therefore of prime importance to the community that reasonable incentives are offered for securing the optimum of agricultural production. It would also follow that the contentment or the general well being of the classes engaged in agriculture should be secured. Opinions might differ as to policy or the measures which would bring about these favourable conditions. Indeed learned counsel went so far as to suggest that the policy put forward in the Second Five Year Plan and the measures which are being taken to implement it would impede and not further the objective in view. It is not the province of the Court to assess or examine the policy or wisdom of the legislation ; that is the exclusive function of the Legislatures constituted by the duly elected representatives of the people.

We unhesitatingly reject the contention urged that the restriction imposed on the right to hold property enacted by the impugned Act is one not in the interests of the general public. We are therefore of the opinion that section 4 has not been proved to be invalid by reason of its repugnancy to Article 19 (1) (*f*).

The second contention of learned counsel was that sections 3 and 4 and in fact the entire enactment were repugnant to Article 19 (1) (*g*) and were not saved by Article 19 (6) of the Constitution. In this connection learned counsel relied on the decision of the Supreme Court in *Captain Ganapathi Singh* v. *The State of Ajmer*[1]. The case concerned the validity of section 40 of the Ajmer Laws Regulation of 1877 which enabled the Chief Commissioner to frame rules regarding the establishing of a proper system of conservancy and sanitation at fairs. Under the rules so framed the District Magistrate was empowered to revoke any permit granted for conducting a fair without assigning any reasons or giving any previous notice. The appellant was a landholder on whose land a cattle fair had been held every year for 20 years previous to 1951. He applied to the District Magistrate for permission to continue this fair but this was refused on the ground that permits would not be issued to private individuals. The appellant challenged the constitutional validity of the regulation as well as the order of the District Magistrate purporting to be under the bye-law framed thereunder and the Supreme Court upheld his contention. The passage relied on by learned counsel for the petitioner is one in the judgment of Bose, J., reading

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[1] 1955 S.C.J. 119: (1955) 1 S.C.R. 1065.

> "It is admitted that the land on which the fair is normally held belongs to the appellant. The holding of an annual fair is an occupation or business within the meaning of Article 19 (1)(*g*), therefore, the appellant also has a fundamental right to engage in that occupation on his land provided it does not infringe any law imposing 'reasonable restrictions on that right in the interests of the general public' or any law 'relating to'
>
> (1) the professional or technical qualifications necessary for practising or carrying on' the occupation or business in question (Article 19 (6) as amended in 1951) ".

Whatever might be said of the right to hold a fair on the land, we are clearly of the opinion that the right of an owner personally to cultivate his land is not a right to carry on an occupation but only a right to hold or enjoy the property. This apart, we are of the opinion that there is no restriction on the petitioner's right to carry on business as an agriculturist which is what the learned counsel urged on his behalf, because he can still carry it on provided he can acquire land on which to do so. The freedom guaranteed by Article 19 (1) (*g*) is not one to carry on an occupation or business in any particular place but the clause is designed to ensure that no unreasonable fetters shall be imposed if one were minded to engage oneself in it. (Vide *Ibrahim* v. *Regional Transport Authority*[1].) We are clearly of the opinion that the objection that the impugned enactment is repugnant to Article 19 (1) (*g*) is without any substance.

The next point urged by learned counsel for the petitioner was as regards the effect of section 6 on the validity of the enactment. This section which bars the jurisdiction of Civil Courts enacts :

> "No civil Court shall, except to the extent specified in section 3 (3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

The contention urged on this head was that the ousting of the jurisdiction of civil Courts to hear disputes between landlords and tenants governed by this enactment was a denial of the equal protection of the laws to the classes of landlords and was therefore obnoxious to Article 14 of the Constitution. It was also urged that as no appeals had been provided from the orders of the Revenue Divisional Officer this constituted a further violation of Article 14. This objection does not in our opinion merit serious consideration. The setting up of Revenue Courts manned by officers of the Revenue Department has been the general pattern of tenancy legislation for over a century, and the vesting therefore of powers in a Revenue Court instead of in a civil Court cannot be objected to on the ground that the presiding officer of the former Court has not the equipment necessary to deal properly and justly with the questions entrusted to his jurisdiction. We would only add that it would be for the Legislature to prescribe the machinery for adjudicating disputes and no constitutional objection could be raised on the score that the adjudicating machinery set up does not conform to any particular type or pattern. Nor do we see any point in the objection that the failure to provide for an appeal from the order of the Revenue Divisional Officer vitiates the law on the ground of a denial of equal protection. After all an appeal is wholly a creature of statute and there is no common law or general right to appeal unless the statute so provides. In these circumstances we reject this ground of objection that the enactment violates Article 14.

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[1] (1953) 1 M.L.J. 205 at 210 (S.C.) : (1953) S.C.J. 31 : (1953) S.C.R. 290.

The last point urged was that section 4 was discriminatory against landlords owning more than 6 2/3 acres of wet land as not founded on any rational basis. We have considered this point already and in view of what we have stated earlier this contention is rejected. In our judgment therefore the impugned enactment is a valid piece of legislation.

The result is that the writ petition fails and is dismissed. There will be no order as to costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

V. Dhanmull Sowcar, Proprietor, Jai Jinander Bus Service, Tiruvannamalai .. *Petitioner.**

v.

Secretary, Regional Transport Authority at Vellore & others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 44 (5) *and rule* 134-*A—Validity of—Delegation of powers under—If unconstitutional.*

The provision in section 44 (5) of the Motor Vehicles Act for the delegation of powers of a Regional Transport Authority does not offend the well-recognised concept of jurisdiction that a judicial (or quasi-judicial as in the instant case) officer cannot delegate his functions to another. Nor does the section amount to an abdication of its legislative functions by the Legislature and the delegation is neither excessive nor unconstitutional. Rule 134-A of the rules is not *ultra vires* the rule-making authority and is quite valid.

(1956) An. W.R. 142, followed.

(1956) An. W.R. 400, disapproved.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* or other appropriate writ or direction calling for the records from the Respondents 1 to 3 relating to their orders in R. No. 12153/A-5/54, dated 11th April, 1955, R. No. 21576/A-2/55, dated 29th June, 1955 and G.O.R. No. 4262, dated 28th December, 1955, respectively and quash the same.

R. M. Seshadri and *R. Narayanan,* for the Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and Special Government Pleader (*V. V. Raghavan*) on behalf of the Respondents.

The Judgment of the Court was delivered by

Rajagopalan, J.—The petitioner held a permit granted by the Regional Transport Authority, North Arcot District, for his motor bus M.D.J. 134. On a report by the Assistant Motor Vehicles Inspector, that on 12th October, 1954, the bus was overloaded by 39 persons, the Regional Transport Officer, who was also the Secretary of the Regional Transport Authority, North Arcot District, issued a notice to the petitioner, held an enquiry and eventually directed the suspension of the petitioner's permit for three months. That was confirmed on appeal by the Central Road Traffic Board. The petitioner moved the Government to revise the orders under section 64-A of the Motor Vehicles Act as it stood then. On 28th December, 1955, the Government reduced the period of suspension to two months.

The petitioner applied under Article 226 of the Constitution to quash the proceedings and the orders of all the three authorities mentioned above. The main contention of the petitioner was that the Regional Transport Officer had no jurisdiction to suspend the permit held by the petitioner for his bus M.D.J. 134.

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* W.P. No. 74 of 1956. 9th October, 1956.

Section 44 (1) of the Motor Vehicles Act (hereinafter referred to as the Act) empowers the State Government to constitute Regional Transport Authorities and to define the limits of the territorial jurisdiction of each such Regional Transport Authority. Section 45 specifies the Regional Transport Authority to which an application for a permit should be preferred. It is that Regional Transport Authority that has to grant that permit.

Section 60 of the Act, which provides for the cancellation or suspension of a permit, runs :

> " (1) The transport authority which granted a permit may cancel the permit or may suspend it for such period as it thinks fit—
>
> (*a*) on the breach of any condition specified in sub-section (3) of section 59, or of any condition contained in the permit, or
>
> (*b*) if the holder of the permit uses or causes or allows a vehicle to be used in any manner not authorised by the permit, or
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> (*c*) if the holder of the permit ceases to possess the vehicle or vehicles covered by the permit, or
>
> (*d*) if the holder of the permit has obtained the permit by fraud or misrepresentation ;
>
> Provided that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to submit his explanation.
>
> (2) Where a transport authority cancels or suspends a permit, it shall give to the holder in writing its reasons for the revocation or suspension."

Were section 60 of the Act the only statutory provision to be considered, it should be obvious that it was only the Regional Transport Authority, North Arcot District, which had granted the permit to the petitioner that could claim authority to suspend it, and not its Secretary, the Regional Transport Officer.

Section 44 (5) of the Act, however, enacts :

> " The State Transport Authority and any Regional Transport Authority, if authorised in this behalf by rules made under section 68, may delegate such of its powers and functions to such authority or person and subject to such restrictions, limitations and conditions as may be prescribed by the said rules."

The relevant portion of rule 134-A runs :

> "The Board may, for prompt and convenient despatch of business by general or special resolution delegate to the Secretary the following functions :—
>
> * * * * * * * * *
>
> (xi) power under section 60 of the Act to suspend a permit and the power under section 63 (3) read with section 60 of the Act to suspend counter-signatures of permits."

Rule 134-A itself is one of the rules framed in exercise of the rule-making power vested in the Government by section 68 of the Act. The relevant portion of section 68 runs :

> " (1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.
>
> (2) Without prejudice to the generality of the foregoing power, rules under this section may be made with respect to all or any of the following matters,—
>
> * * * * *
>
> (*z-a*) any other matter which is to be or may be prescribed .'

It was on these provisions that the jurisdiction of the Regional Transport Officer to suspend a permit was founded, even though that permit had been granted by the Regional Transport Authority of which that Regional Transport Officer was the Secretary. It was that jurisdiction that the Regional Transport Officer, North Arcot District, exercised and it was that jurisdiction that the petitioner challenged in these proceedings before us.

It was section 44 (5) of the Act that provided for the delegation of powers, and the power vested in the Regional Transport Authority by section 60 to suspend a permit was delegated to the Regional Transport Officer under the authority of the prescribed rule, rule 134-A (xi). The learned counsel for the petitioner contended that section 44 (5) was a void statutory provision, as the delegation it purported to provide for was bad in law and unconstitutional. He urged that the terms of section 44 (5) were very wide. Any of the statutory powers entrusted by the Act to the State Transport Authority or the Regional Transport Authority could be delegated by the respective transport authorities to any person, the only limitation being that the delegation must be authorised by the rules framed under section 68 of the Act. That rule-making power was not retained by the Legislature but was vested in the State Government. The learned counsel submitted that this amounted to abdication of legislative functions. The Legislature did not retain any control either over the delegation which could be effected by the concerned Transport Authority, or over the authorisation to effect that delegation which was wholly left to the State Government.

Before we deal with these contentions we can dispose of a possible argument, that where an enactment entrusted judicial power to a Tribunal, delegation of that power by that Tribunal was not permissible in law. The position in English Law was summed up by the learned author in Broom's Legal Maxims, 10th edition, at page 571 :

> "Nor can an individual, clothed with judicial functions, delegate the discharge of those functions to another, unless, as in the case of a County Court Judge, he be expressly empowered to do so. For the ordinary rule is that, although a *ministerial* officer may appoint a deputy, a *judicial* officer cannot."

The learned author quoted the observation of Lord Camden in *Entick* v. *Carrington*[1] where he held that a Magistrate could not have a deputy to execute any part of his employment :

> " The right is personal to himself, and a trust that he can no more delegate to another, than a justice of peace can transfer his commission to his clerk ".

That principle was restated by Denning, L.J., in *Barnard* v. *National Dock Labour Board*[2] :

> " While an administrative function can often be delegated, a judicial function rarely can be. No judicial Tribunal can delegate its functions unless it is enabled to do so expressly or by necessary miplication."

The power to cancel or suspend a permit on the grounds specified in section 60 (1), with a further specific statutory provision in section 60 itself that the holder of a permit should be given an opportunity to meet the charges and that the final order should furnish reasons for the punishment imposed, would appear to be at least quasi-judicial in its scope. But section 44 (5) of the Act makes an express provision for the delegation of any of the powers conferred by the statute on the Regional Transport Authority. Section 44 (5) makes no distinction between the administrative or ministerial functions of the Regional Transport Authority and its judicial or quasi-judicial functions. It was the same enactment that created the Tribunal, the Regional Transport Authority, and vested powers in it, including the power to delegate any of these statutory powers. That the nomination of the authority or person to whom any of those powers could be delegated was left not to the Regional Transport Authority itself but to the State Government does not detract from the specific provision made by the Act itself in section 44 (5) for the delegation of powers. In *Krishnan* v. *Secretary, Regional Transport Authority, Chittoor*[3], Subba Rao, C.J., observed :

> " The legislature itself conferred certain powers on the Regional Transport Authority and also authorised them to delegate the said powers to another nominated by the Government. If the Legislature has conferred judicial powers on *A* or *B*, it cannot be contended that the said conferment is invalid. If, instead of nominating *B*, it authorises *A* to delegate his functions to *B*, or to a person nominated by the Government, we cannot say that the Legislature has in any way abdicated its functions. In effect, the Legislature has substantially legislated on the subject and left the nomination of the person to the Government."

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[1] 19 Howell State Trials 1030 at 1063.
[2] L.R. (1953) 2 K.B.D. 18 at 40.
[3] (1956) An. W.R. 142 at 154.

We respectfully agree with these observations.

Section 60 of the Act conferred the power to cancel or suspend a permit on the Transport Authority which granted that permit. That was obviously to specify with precision which among the Regional Transport Authorities that were constituted by the State Government under section 44 (1) of the Act should exercise the power, for which section 60 (1) of the Act made provision. We have already referred to section 45 of the Act which specified the Regional Transport Authority, of the several Regional Transport Authorities constituted under section 44 (1), to which an application should be made for a permit. The learned Advocate-General was well founded in his contention, that the qualifying phrase in section 60 (1) " which granted a permit " was not intended to make the power conferred by section 60 (1) of the Act one to be exercised *virtuo officio* that is, a right " personal " to the grantee, the Regional Transport Authority, within the meaning of the principle laid down by Lord Camden in *Entick* v. *Carrington*[1], "a trust that that grantee cannot delegate to another ". We have already pointed out that the Act itself made express provision for delegation in section 44 (5). That specific statutory provision did not offend even the well-recognised principle of law enunciated by Lord Camden in *Entick* v. *Carrington*[1]. To explain the scope of the qualifying phrase " which granted a permit " in section 60 (1), the learned Advocate-General invited our attention to the provisions of sections 59 and 61 of the Act, which provided for the transfer of a permit and vested that power in the Regional Trasnport Authority with a similar qualifying phrase " by which the permit was granted " or " which granted the permit ". We have dealt with this aspect only to emphasise that the specific provision made in section 44 (5) for the delegation of powers of a Regional Transport Authority, inclusive of the power conferred by section 60 (1) of the Act, does not offend any well-recognised concept of jurisprudence.

It should also be noted that the Act left it to the State Government to constitute the State and Regional Transport Authorities, though the Act itself specified the powers to be vested in those authorities. That is also a factor to be taken into account in deciding what is the scope of the delegation for which section 44 (5) of the Act provided. It vested in the Government the power to nominate the person or authority to whom the State Transport Authority or the Regional Transport Authority, all of them constituted by that Government itself, could delegate specified powers, specified in the rules framed by the Government, and subject to the conditions and limitations imposed by those prescribed rules.

We now come back to the contention of the learned counsel for the petitioner that the delegation for which section 44 (5) provided was unconstitutional. We have referred to a passage from the Judgment of Subba Rao, C.J., in *Krishnan* v. *Secretary, Regional Transport Authority, Chittoor*[2], in which the learned Judge pointed out at page 154:

> " In effect the Legislature has substantially legislated on the subject and left the nomination of the person to the Government."

That, he amplified at page 155 of the report :

> " The Legislature cannot abdicate its functions and delegate them to others. But it can always delegate its power to determine some fact or state of things upon which the operation of the law made would depend. The Act clearly and definitely prescribed the powers to be exercised by the Regional Transport Authority. It authorised them to delegate such powers to such authority as prescribed by the rules. The Government under the rule-making power only nominates the authority to whom a prescribed power can be delegated. Therefore, there is no abdication on the part of the Legislature of its legislative functions."

We are in respectful agreement with these observations. In our opinion section 44 (5) of the Act does not amount to an abdication of legislative functions by the Legislature. Taking the scheme of the Act as a whole, it was left to the State Government to constitute the State and Regional Transport Authorities. The powers they were to exercise were specified by the Act. Exercise of those powers had to be regulated by the State, and a fairly extensive rule-making power was conferred on the State Government by section 68 of the Act for carrying into effect the provisions of Chapter IV of the Act. Netither, the validity of section 68 which conferred that rule-making power nor the validity of section 44 (5) which specifically referred to that rule-making power can be challenged as constituting an excessive or unconstitutional delegation of the legislative functions of the Legislature that enacted the Motor Vehicles Act.

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[1] 19 Howell State Trials 1030.

[2] (1956) 2 An. W.R. 142 at 154.

The next contention of the learned counsel for the petitioner was that section 44 (5) itself did not contain any declaration of the policy of the Legislature. It did not prescribe any standards for the exercise of the power which it conferred on the statutory transport authorities to delegate any of its functions. The learned counsel contended that to entrust such arbitrary powers to the State Government constituted a violation of Article 14 of the Constitution, as the operation of section 44 (5) might result in discriminatory legislation. We are unable to accept that contention. We have pointed out that the functions entrusted to the statutory authority, the State Transport Authority or the Regional Transport Authority were specified by the Act. The Tribunals themselves were creatures of the Act. They had to be constituted by the State Government. The discharge of the functions of the statutory Tribunals had to be regulated by the rules prescribed, rules made by the State Government in exercise of the specific power vested in it. It is a little difficult to accept the contention, that the Regional Transport Authority was left without any guidance in exercising the powers for which provision was made by section 44 (5) of the Act. It is not the State Government that could delegate any power vested in the Regional Transport Authority. Section 44 (5) empowered only the Regional Transport Authority to delegate its power. But the limitation set upon the exercise of the power was that such a delegation must be authorised by the State Government and should be subject to such limitations as may be prescribed by the rules made by the State Government under the rule-making power conferred on it by section 68 (1) of the Act. The State Government itself has been given large powers to ensure the proper administration of the Act in accordance with the principles and policy embodied in the Act. It cannot be said that the State Government, on whom the power was conferred by section 44 (5) to regulate and authorise the delegation of powers for which section 44 (5) provided, was left without any guidance by the Act itself.

We hold that section 44 (5) of the Act is valid.

The further contention of the learned counsel for the petitioner was that even if section 44 (5) of the Act could not be struck down as invalid and unconstitutional, rule 134-A, and in particular rule 134-A (xi) were *ultra vires* the rule-making authority, the State Government.

The first contention of the learned counsel under this head was that section 44 (5) in terms authorised only the delegation of powers brought into existence by the prescribed rules and not for the delegation of any of the statutory powers specified by the Act itself as vesting in the appropriate authority, the State Transport Authority or the Regional Transport Authority. To appreciate this contention the relevant portion of section 44 (5) may be set out again.

> "The State Transport Authority and any Regional Transport Authority....may delegate such of its powers and functions to such authority or person....as may be prescribed by the said rules".

It was urged that the provision has to be read as

> "the Regional Transport Authority may delegate such of its powers and functions as may be prescribed by the rules to such authority or person as may be prescribed by the rules".

The authority or person to whom the statutory powers and functions of the Regional Transport Authority may be delegated has to be specified in the prescribed manner in the rules framed under section 68 of the Act. 'Prescribed' has been defined by section 2 (21) of the Act as "prescribed by the rules made under the Act", unless, of course, the context warrants a different interpretation. If the person or authority to whom the powers can be delegated is specified by the State Government in a prescribed rule, one of the requirements of section 44 (5) is satisfied. Similarly if any of the statutory functions of the Regional Transport Authority is specified in a prescribed rule, the other requirement of section 44 (5) for a valid delegation is satisfied. We are unable to see any real basis in the language of section 44 (5) for the contention of the learned counsel, that it is only a function or power that is the creature of a prescribed rule, and not any of the statutory powers, that can be delegated under the provisions of section 44 (5). The legislature enumerated the powers and functions of the State Transport Authority and those of the Regional Transport Authority. In addition the legislature enacted section 44 (3) (*d*) which provided for the conferment on the State Transport Authority functions as may be prescribed. The ambit of section 44 (5) is the entirety of the powers and functions, the statutory powers and functions of the State Transport Authority and those of the Regional Transport Authority as well as the functions of the State Transport Authority founded ultimately on section 43 (3) (*d*). Both as a matter of plain language of section 44 (5) and as one of the intendment of the Legislature, it seems clear to us that what section 44 (5) provides for is delegation of any of its powers and functions by the Transport Authority concerned to a person or authority specified by an appropriate rule framed by the State Government under section 68 of the Act.

The next contention of the learned counsel was that rule 134-A (xi) fell outside the scope of section 68 of the Act, and was therefore *ultra vires* the Government. In *Padmanabhan* v. *State of Madras*[1], one of us pointed out that sub-section (2) of section 68 of the Act does not exhaust or otherwise limit or control the rule-making powers of the Government under sub-section (1), and that sub-section (2) only amounts to a statutory recognition that all the specific items mentioned therein are within the scope of the general powers conferred by sub-section (1). The position in fact, as we understood the learned counsel for the petitioner, was not challenged by him. What the learned counsel urged was that the power of the Government under section 68 (1) was limited by the purpose specified in section 68 (1) itself, " the purpose of carrying into effect the provisions of this Chapter (Chapter IV). The learned counsel submitted that the true scope of section 44 (5) read with section 68 (1) of the Act was that anything ancillary to the exercise of a power conferred on a Regional Transport Authority by the Act could be delegated by that authority under section 44 (5), on satisfying the conditions imposed by section 44 (5) but that section 44 (5) did not authorise the delegation of the exercise of the statutory power itself. We are unable to accept that the scope of the delegation authorised by section 44 (5) of the Act is so limited. It is true that section 44 (5) requires that before a transport authority could delegate any of its powers and functions it should be authorised in that behalf by a rule or rules made under section 68 of the Act. Section 68 of the Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of the Chapter. Section 44 (5) is one such provision. If there is to be a delegation under section 44 (5), that is for the purpose of section 44 (5), there should be a rule. To give effect to the purpose of the Act, and to achieve a valid delegation under section 44 (5), a rule has to be framed, there has to be a prescribed rule. Rule 134-A does carry into effect the provisions of section 44 (5). Without rule 134-A there can be no delegation of powers, which as we said, is one of the purposes of the Act declared by section 44 (5) of the Act. Rule 134-A would certainly fall within the scope of section 68 (2) (*za*) " Any other matter which is to be....prescribed ". As we said the specification in section 68 (2) (*za*) does not control the generality of the power conferred by section 68 (1) of the Act. Of course, it does not enlarge it either. Rule 134-A, in our opinion, and certainly item (xi) of that rule fall within the scope of section 68 of the Act. It is a rule prescribed for the purpose of carrying into effect the provisions of Chapter IV within the meaning of section 68 (1) of the Act.

The validity of rule 134-A was upheld in *Krishnan* v. *Secretary, Regional Transport Authority, Chittoor*[2], and with that conclusion we are in respectful agreement. Our attention was invited to a subsequent decision of the Andhra High Court in *Amaravathi Motor Transport Co.* v. *State of Andhra*[1], where, while upholding the validity of rule 134-A (xi) as well within the scope of the rule-making power conferred upon the State Government by section 68 (1) of the Act, the learned Judges came to the conclusion, that the Regional Transport Officer had power under rule 134-A (xi) only to suspend a permit that he himself had granted, and that he had no jurisdiction to suspend a permit that had been granted by the Regional Transport Authority. The learned Chief Justice observed at page 404 :

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[1] (1956) 1 M.L.J. 179.

[2] 1956 An.W.R. 142.

> " It is clear that rule 134-A (xi) is a general provision and section 60 (1) is a special provision overlapping each other to some extent in respect of the same subject-matter. Both provide for suspending a permit already issued. While rule 134-A (xi) says that the Secretary can suspend a permit under certain circumstances, section 60 enacts that the Secretary can suspend a permit only if he has granted it. Section 60 being a special provision governing suspension of a permit by an authority who issued it, overrides the general rule empowering the authority to cancel a permit issued even by a superior officer."

With all respect to the learned Chief Justice we are unable to agree. We are unable to discover any real basis for holding that section 60 is a special provision and that rule 134-A (xi) should be construed as a general provision regulating the jurisdiction to cancel or suspend permits. Section 60 of the Act is the only provision in the Act itself, which provides for the exercise of the power to suspend or cancel a permit. It is that power that can be delegated under section 44 (5) of the Act. It was that power that was delegated to the Regional Transport Officer under rule 134-A (xi). The validity of that delegation was upheld by the learned Judges and we have already held that rule 134-A including item (xi) thereof is *intra vires* The delegation under section 44 (5) is subject to any limitations or conditions that can be imposed by the rule-making power. Rule 134-A (xi) did not impose any condition either expressly or by necessary intendment that the operation of that rule was confined only to a permit granted by the Regional Transport Officer himself. The authority to grant a permit was given to the Regional Transport Authority by the Act. Delegation of that power was permissible under section 44 (5) of the Act, and a limited power was delegated to the Regional Transport Officer by rule 134. We have endeavoured to explain the scope of the qualifying phrase "which granted a permit " in section 60 (1) of the Act. In our opinion, section 60 (1) is the only statutory provision for the power to punish by suspension. Exercise of that power is further regulated by rule 134-A (xi). The delegation of the jurisdiction to exercise that power is valid. Still, what has been delegated is only the power conferred by section 60 (1) of the Act. If the delegation is valid, it is that power, subject to the conditions and limitations imposed by rule 134-A (xi) that vests in the Regional Transport Officer and that vesting is valid.

We have so far discussed the question at issue as if it were *res integra* as far as this Court is concerned, reserving to the last a reference to an unreported decision of a Division Bench of this Court in W.P. No. 87 of 1951. After referring to section 44 (5) and to rule 134-A (xi) the learned Judges held :

> "So the Regional Transport Officer was acting well within the scope of the provisions of the Act in passing an order of suspension ".

The learned Judges also observed :

> " Once a function is among those prescribed by the rules, delegation cannot be challenged."

We respectfully agree with these observations, and that is a decision binding on us as authority.

The only question raised before us was that of the jurisdiction of the Regional Transport Officer. That depended on the validity of the delegation effected by rule 134-A (xi) under section 44 (5). That validity we have upheld.

The rule is discharged. The petition is dismissed. No order as to costs.

We understood the scope of the arguments at one stage to be only the validity of the delegation effected by rule 134-A (xi) read with section 44 (5) of the Act.

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[1] (1956) An. W.R. 400.

After we had read out the earlier portion of the Judgment Mr. Seshadri represented that he had further points—those specified in paragraphs 7 and 8 of the affidavit of the petitioner. Those in our opinion, do not vitiate either the existence of the jurisdiction or even its exercise.

R.M. —— *Rule discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Messrs. Ramraj Tobacco Trading Company
by its Partner D. K. Narayanan .. *Petitioners**

v.

The Assistant Commercial Tax Officer, Attur .. *Respondent.*

Madras General Sales-Tax Act (IX of 1939), *section* 5, *items (vii) and (viii) as amended by section* 2 *of the Madras Tobacco (Taxation of Sales and Registration) Act (XIII of* 1955)—*Validity—Madras General Sales-Tax Act, section* 3 (1-*A*)—*Validity.*

Section 2 of the Madras Act (XIII of 1955) which has amended section 5 of the Madras General Sales-Tax Act by adding two more items (vii) and (viii), bringing in the sale of tobacco and tobacco products within the scheme of a single point tax under the said Sales-tax Act is valid and cannot be challenged on the ground that the tax imposed amounts to a duty of excise. Nor does the amendment offend Article 14 of the Constitution.

Section3(1-A) of the Madras General Sales-Tax Act introduced by the Madras Act(VII of 1955) is only a machinery provision intended for securing to the State the tax due and payable to it. The provision does not amount to taxing an anticipated sale but is only a provision designed to ensure that a certain tax liability shall not be evaded. The rules relating to provisional assessment and collection of tax, which are brought into conformity with the Act by this amendment are valid and within the legislative power of the State.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit a writ of *mandamus* to direct the Assistant Commercial Tax Officer, Attur to forbear from taking any action under the impugned Act, Madras Act (XIII of 1955) amending the Madras Act (IX of 1939).

K. Bhashyam, T. R. Srinivasan, T. Ramalingam, N. R. Raghavachariar and *V. C. Srikumar* for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Assistant Government Pleader (*K. Veeraswami*) on behalf of the State.

The Court delivered the following

ORDER.—The constitutional validity of section 2 of the Madras General Sales-Tax and the Madras Tobacco (Taxation of Sales and Registration) Act (XIII of 1955)—which we shall refer to as the impugned Act—is the subject of challenge in these writ petitions.

Section 2 of the impugned Act whose validity is challenged in these proceedings amended section 5 of the Madras General Sales-Tax Act, 1939.

The general scheme of taxation provided by the Madras General Sales-Tax Act is the imposition of a multiple point levy by taxing the turnover of every dealer carrying on business within the State. This is achieved by the charging section 3 which taxes every dealer on his annual turnover and the standard rate of tax provided by sub-section 1 (*b*) is three pies for every rupee of the turnover. Section 5 enacts the exemptions and reductions in the imposition of such a multiple point tax and the main feature of the 'restriction' imposed is that in regard to the commodities specified in the several sub-sections the tax is levied only at such single point either set out in the body of the Act or left to be prescribed by the rules. The impugned enactment added the following items to section 5 and subjected them to tax at a single point at specified rates. The material portion of section 2 of the impugned Act runs thus :

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*W.P. Nos. 871 of 1955, 118 and 1038 of 1956. 16th November, 1956.

> " In the Madras General Sales-Tax Act, 1939.. ..
>
> (ii) in section 5, after item (vi), the following items shall be added, namely :—
>
> " (vii) the sale of cigars and cheroots at less than two annas per cigar or cheroot, and bidis, snuff, chewing tobacco or any other product manufactured from tobacco shall be liable to tax under section 3, sub-section (1), only at the point of the first sale effected in the State of Madras by a dealer but at the rate of six pies for every rupee on his turnover ;
>
> (viii) raw tobacco, whether cured or uncured, shall be liable to tax under section 3, sub-section (1), only at the point of the first purchase effected in the State of Madras by a dealer but at the rate of six pies for every rupee on his turnover.
>
> Provided that where a dealer who has paid tax in respect of his turnover relating to goods included in clause (vii) has also paid the tax on the purchase of raw tobacco used in the manufacture of such goods under clause (viii) he shall be entitled to a rebate to the extent of tax paid in respect of the raw tobacco so used."

Before formulating the points urged in support of this challenge by learned counsel for the petitioners it would tend to convenience if we set out briefly the facts of these petitions, so as to appreciate how the impugned tax affects the transactions involved in them.

W. P. No. 871 *of* 1955.—The petitioner in this petition is a firm dealing in tobacco. In the course of its business the firm purchased tobacco from growers, obtained the licence from the Union Government to store the goods under the Central Excise and Salt Act (I of 1944) and paid the appropriate excise duty on the tobacco stored by it under that enactment. It sold these goods in the course of its business to other merchants. The impugned Act came into force on 1st April, 1955 (section 1 (2)) and as the petitioner-firm was the first purchaser in the State, of the tobacco dealt with by it, the sales-tax authorities required it to pay the tax on this purchase under section 5 (viii) of the Act as amended. As the petitioner failed to do so, it was threatened with punitive action under the provisions of the Madras General Sales-Tax Act, and it thereupon filed this petition challenging the validity of the tax on this purchase of tobacco and applied for the issue of a writ of *mandamus* to desist from taking further action for the collection of the tax and has obtained a rule *nisi*.

W. P. No. 118 *of* 1956.—The petitioner in this writ petition is a firm carrying on business in the manufacture of bidis, the factory being situated in Salem. Bidis were not subject to sales-tax by reason of an exemption contained in section 4 of the Madras General Sales-Tax Act to which we shall advert in its proper place. After Act (XIII of 1955) came into force the Assistant Commercial Tax Officer, Salem, required the petitioner to submit a return as regards the sales. A partner of the petitioner-firm appeared before this officer and made a statement that the firm anticipated a turnover of Rs. 10,00,000 in regard to the bidi sales during the year 1955 1956 and an advance turnover statement was duly signed and filed. The petitioner was thereupon provisionally assessed to a tax of Rs. 31,250 for the year ending 31st March, 1956 with a direction that the tax should be paid in monthy instalments of Rs. 2,604 and threatening it with compulsory recoveries and penalties in the event of the tax not being paid on the due dates. The petitioner had been paying these instalments until February, 1956, when it filed the present writ petition. The petitioner was further required to take out a licence for conducting its business and it complied with this requisition. It paid the licence fee demanded which was based on the turnover as estimated by the petitioner itself, namely, Rs. 10,00,000 per year. This petition was filed in February, 1956, for an appropriate direction under Article 226 of the Constitution restraining the Deputy Commercial Tax Officer, Salem, from levying or collecting the tax. It will be seen that the provision relevant to this petitioner's complaint is sub-section (vii) of section 5, namely, a tax on the first sale of bidis effected in the State of Madras at Rs. 0-0-6 per rupee on the turnover.

W. P. No. 1038 *of* 1956.—The petitioner here is the proprietrix of a cheroot factory. For the purpose of manufacture she purchased raw tobacco on which by virtue of section 5, item (viii) introduced by the impugned amending Act she has paid tax at Rs. 0-0-6 in the rupee. On her sales of cheroots she is liable to tax under section 5 (vii) at the rate of Rs. 0-0-6 per rupee. Of course she is entitled to the deduction of the purchase-tax in calculating the net sales-tax payable by her by reason of the proviso to section 5 (viii) which we have extracted earlier. But her contention is that both the purchase tax levied and the sales-tax demanded are illegal. Challenging the validity of these impositions she has invoked the jurisdiction of this Court under Article 226 of the Constitution to restrain the Tax Authorities from proceeding to levy or collect the tax from her.

Mr. Bashyam Ayyangar, learned counsel, for the petitioners in W.P. Nos. 871 of 1955 and 1038 of 1956 as well as the learned Advocate-General who appeared for the respondent supporting the validity of the tax imposition took us in detail through the history of the taxation on tobacco and tobacco products in this State to enable us to understand the economic or financial implications of the impugned legislation. We do not consider it necessary to burden this judgment with those details. It is sufficient if we set out the broad outlines which stand out in this history. It is a matter of common knowledge that taxes on the sale of goods were imposed for the first time in this country after the Government of India Act, 1935, which came into force on 1st April, 1937. So far as Madras is concerned, tax legislation of this type was first undertaken in 1939. Four enactments were passed in relation to this matter almost at the same time, the Madras Electricity Duty Act (V of 1939), the Madras Sales of Motor Spirit Taxation Act (VI of 1939), the Madras Tobacco (Taxation of Sales and Licensing) Act (VIII of 1939) and the Madras General Sales-Tax Act (IX of 1939). As the charging section in the Madras General Sales-Tax Act, namely, section 3, was of the widest amplitude and included within it a dealer of every type of goods, it was necessary to enact a provision to exclude from the operation of the sales-tax imposed by it, goods which were covered by the other special enactments, so as to avoid double taxation.

This was achieved by enacting section 4 which in its original form ran : (We set out only the words relevant to the taxation of tobacco).

> 4. The provisions of section 3 of this Act shall not apply to the sale of......
>
> " manufactured tobacco " as defined in the Madras Tobacco (Taxation of Sales and Licensing) Act (VIII of 1939)."

Manufactured tobacco was defined in Act (VIII of 1939) in its section 2 (8) thus :

> " 'Manufactured tobacco' means cigars, cheroots, cigarettes, cigarette tobacco, pipe tobacco, bidis and snuff but does not include any preparation or mixture of tobacco intended for a further process of manufacture."

It is needless to mention that " manufactured tobacco " was subject to tax, under Act (VIII of 1939) and this was the only tax which persons who handled tobacco had to pay, *i.e.*, there was then no excise duty on tobacco or tobacco products.

A change was however effected in this scheme of taxation by the Central Excise and Salt Act (I of 1944) which consolidated and amended the law relating to Central Duties and Excise on goods manufactured or produced in India. Section 3 of the Act which is the charging provision provides for the levy and collection of such duties as may be prescribed on all excisable goods produced or manufactured in India at the rates specified in the first schedule. Item No. 9 of the first schedule as originally enacted included tobacco cured, tobacco being defined as " any form of tobacco cured or uncured, and whether manufactured or not " including the leaf, stalks and stems of the tabacco plant. Varying rates of duty were levied on different varieties of tobacco, Virginia or country, and also on different types of curing to which the leaf was subjected and also on two manufactured products, cigars and cheroots. By an amendment effected in 1951 cured or uncured tobacco were both made liable to the duty as also cigarettes.

Sections 6 and 8 of Act (I of 1944) empowered the Central Government by notification to provide that as and from the dates specified no person shall except under the authority and in accordance with the terms and conditions of a licence engage in the production or manufacture of any specified excisable goods as also the wholesale purchase or sale or storage of any excisable goods specified in Part A of the Second Schedule " and no person shall have in his possession any excisable goods in excess of the maximum quantity that may be prescribed" respectively. Tobacco was specified as such an article under both these provisions. The Central Excise and Salt Act came into force as and from April, 1944.

At the same time as this Central legislation, Madras Act (XII of 1944) effected the changes in the relevant local enactments. By section (1) of the amending Act the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939 was repealed as and from 1st April, 1944 and in section 4 of the Madras General Sales-Tax Act there was substituted for the reference to manufactured tobacco " *etc.*, the words tobacco in any form whether manufactured or not ". The result of these changes was as and from 1st April, 1944, there was no tax on sales of tobacco or its products, the only tax payable in regard to them being the duty levied under the Central Excise and Salt Act, 1944.

Notwithstanding some intermediate local legislation, excise duties continued to be sole tax levied on tobacco or its products till 1953 when the Madras Tobacco (Taxation of Sales and Registration) Act (IV of 1953) in an amended form was passed. The charging section of this enactment of 1953 section 4 (1) levied a tax on the "first sale of taxed tobacco " effected in the State of Madras, the tax being made payable by the seller. Taxed tobacco was defined by section 2(13) to mean ' Manufactured tobacco liable to tax under this Act, namely, cigars, cheroots, cigarettes, cigarette tobacco and pipe tobacco". The provisions as regards registration and licensing, *etc*,, enacted by the Act were however directed not merely to persons dealing in taxed tobacco but all persons doing business in tobacco which was defined to " include every form of tobacco, that is to say, manufactured, cured or uncured tobacco, any preparation or mixture of tobacco and the leaf of the tobacco plant". Section 4 (3) (*a*) however exempted from the tax levied by the charging section on sales of cigarettes at less than three pies per cigarette as also sale of cigars and cheroots at less than two annas per cigar or cheroot, thus exempting from tax a large number of varieties of these tobacco products. It would also be seen that raw tobacco whether cured or uncured though subject to the licensing provisions did not attract any duty on sales. The taxing, registration and licensing provisions of this enactment operated side by side with the provisions of the Central Excise Act (I of 1944) and the taxation levied under it. It is unnecessary to consider the exact scope of the exemption in relation to tobacco under section 4 of the General Sales Tax Act, 1939, as it is common ground that until the impugned Act was enacted, no tax on the sale of these goods was levied except under the provisions first of Madras Act (VIII of 1939) and latter under Act (IV of 1953).

Next we have the impugned Madras Act (XIII of 1955). By section 2 (1) it altered the scope of the exemption granted by section 4 of the Madras General Sales Tax Act, 1939 whereby it became confined to taxed tobacco as defined in section 2 (13) of the Madras Tobacco (Taxation of Sales and Registration) Act (IV of 1953). We have already set out the definition of taxed tobacco in the Madras Act (IV of 1953) as it was when enacted. This included only cigars, cheroots, cigarettes, cigarette tobacco and pipe tobacco and did not include tobacco raw or cured other than cigarette tobacco or pipe tobacco. Section 3 of the Act of 1955 however altered this definition in the Act of 1953 by omitting the words, cigars, cheroots, cigarettes, cigarette tobacco and pipe tobacco so that as amended taxed tobacco meant manufactured tobacco liable to tax under the Act and purchases and sales in regard to these alone were exempt from Sales Tax under Act (IX of 1939). The net result of the changes carried out by this complicated phraseology and cross-exemptions was that all transactions of sale or purchase of tobacco and tobacco products were subjected to tax either under the Tobacco Taxation Act (IV of 1953) or under the General Sales Tax Act (IX of 1939) a double tax under both these being avoided, but this sales tax was to exist side by side with the excise duty under the Central Excise Act. In general the scheme of the division between the two sales-tax enactments appears to be that while the higher priced tobacco products and cigarettes fell within the scope of the Tobacco Taxation Act (IV of 1953) bidis, snuff and the lower priced varieties of cigars and cheroots and raw tobacco (cured or uncured were taxed under the General Sales-Tax Act (IX of 1939).

In passing we might mention that in these writ petitions learned counsel confined their attack to the validity of section 2 of Act (XIII of 1955) which amended the General Sales-Tax Act (IX of 1939) and did not call in question the validity of Act (IV of 1953) either as originally enacted or as amended by section 3 of the Act (XIII of 1955).

The main contention urged by Mr. Bashyam Ayyangar, learned counsel, who appeared for the petitioners in W.P. Nos. 871 of 1955 and 1038 of 1956, was that the single point tax on the first purchase effected in the State of Madras of raw tobacco, whether cured or uncured, directed to be levied under the amended section 5 (viii) of the Madras General Sales Tax—Act, 1939 was in truth and substance a duty of excise which was exclusively a Union subject and was therefore *ultra vires* the State Legislature. Entry 84 of the Union List reads :

> "Duties of excise on tobacco and other goods manufactured or produced in India except . . ."

It was contended that the tax imposed by the Amendment Act (XIII of 1955), whose terms we have set out at the beginning of his judgment fell, within this entry and was not " a tax on the sale or purchase of goods", within Entry 54 of the State list. Learned counsel pointed out that side by side with the tax directed to be levied by the impugned Act was the excise duty payable on tobacco under the Central Excise Act (I of 1944). Under section 3 of the Excise Act tobacco, cured or uncured, manufactured or not, including the leaf, stalks, stem of the tobacco plant was liable to excise duty at various rates per lb. depending upon the quality and grade of the tobacco. The broad contention urged by Mr. Bashyam Ayyangar was that the tax levied by the impugned enactment was merely an addition to the excise duty thus levied by the Central Excise Act, and that it was in substance a tax on production though in form it purported to be a tax on the sale of goods. In this connection learned counsel relied on passages in the judgment of the Federal Court in In re. *The Central Provinces and Bearar Sales of Motor Spirit, Etc., Act*[1]. In particular he drew our attention to passages in the judgment which explained that the term excise considered in vacuo was one of wide and indefinite import and apt to include any internal and indirect duty which was calculated to burden production. If this wide meaning were given to the expression undoubtedly any tax on the sale of the products of manufacture would be " excise and there were some decisions of the High Court of Australia which favoured such an interpretation. These however could obviously not be applied for interpreting the entry in the Government of India Act, 1935 which while reserving duties of excise to be levied by the Centre, specifically vested a power in the Provinces to levy taxes on the sale of goods. It was the problem of reconciling the scope of these two competing powers and the allocations of the respective spheres allotted to the two Governments that had come up for consideration in the *C. P. Petrol Case*[1], which was a reference by the Governor-General under section 213 of the Government of India Act invoking the consultation jurisdiction of the Federal Court to determine the constitutional validity of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, which was questioned by the Government of India. The sales-tax whose validity was impugned was that levied on retail sales of petrol and petroleum products by any dealer whether he were the manufacturer or not. The opinion of the Court was in favour of the validity of the legislation as one falling in substance within the entry taxes on the sale of goods," though the reasons assigned by the three learned Judges for this conclusion were not identical or even uniform. There were passages in the opinion expressed which appeared to lay emphasis on the facts that the legislation debated before them related to a tax on a retail sale, *i.e.*, a sale, to the ultimate consumer.

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[1] (1938-39) F.L.J. (F.C.) 6 : (1939) 1 M.L.J. (Supp.) 1 : (1939) F.C.R. 18 (F.C.).

The question as to the import of the expression "excise" and whether a sales-tax could be held to be a duty of excise came up however for consideration in a pointed form in the *Province of Madras* v. *Boddu Paidanna* & *Sons*[1]. The case was concerned with the validity of a tax on the sale of groundnut oil. Under the Madras General Sales-Tax Act a tax was levied on the purchaser of groundnuts. When a miller of groundnut oil made his purchasers he had to pay this purchase tax. When, after milling, oil was extracted and the producer sold the oil, a tax on the sale of the oil was levied and collected from the seller, *i.e.*, the miller. Provision was however made by rules framed under the Act by which manufacturers became entitled to claim a rebate from the tax on the sale of the oil of the amount of tax paid at the point of the purchase of the nuts. A miller carrying on business in Vizianagaram challenged the validity of these taxing provisions and filed a suit for the recovery of the nett sales-tax paid by him, the contention being that the tax, though termed a sales-tax, was really and in effect an excise duty. Several other subsidiary contentions were also raised, to which however there is no need to refer. The District Munsif of Vizianagaram decreed the suit and the appeal filed by the Province to the District Court was transferred to this Court for hearing. The appeal came on for hearing before Leach, C.J., and Chandrasekhara Ayyar, J., and the learned Judges dismissed it. It was contended on behalf of the Province that in a constitution which vested a specific power to tax sales in Provinces, the expression " excise " must be so read as to exclude taxes on sales, and that in the context of these competing entries in the Government of India Act " excise " must be given the restricted meaning of a tax on manufacture or production—a meaning which could not embrance a tax on the occasion of sale. This construction was however rejected by this Court relying on certain passages in the opinion of the Federal Court in the *C. P. Petrol Reference*[2], from which the principle was deduced that a tax on first sales by a producer or manufacturer was a duty of excise as it fell on the producer or manufacturer and was therefore to be treated as a burden on production or manufacture.

The Province preferred an appeal to the Federal Court, where this judgment was unanimously reversed *The Province of Madras* v. *Boddu Paidanna & Sons*[1]. The argument put forward on behalf of the Province as to the relative scope of exercise and sales-tax was accepted, and their Lordships stated that their decision in *C. P. Petrol Reference*[2], was not meant to draw a distinction between first sales and retail sales. Explaining the distinction between the scope of the two entries " excise " and " taxes on the sale of goods " their Lordships said (pages 101 and 102).

> " The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to the *Central Provinces Case*[2], duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxes. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer : but it is levied upon him *qua* seller and not *qua* manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit ; but so is the tax-payer in Canada who has to pay income-tax levied by the Province for provincial purposes and also income-tax levied by the Dominion for Dominion purposes ; see *Caron* v. *The King*[3] ; *Forbes* v. *Attorney-General for Manitoba*[4]. If the tax-payer who pays a sales-tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense ; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away . . . .

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[1] (1942) F.L.J. (F.C.) 61 : (1942) 2 M.L.J. (Supp.) 1 : (1939) F.C.R. 18 (F.C.).
327: (1942) F.C.R. 90 (F.C.). [3] (1924) A.C. 999.
[2] (1938-39) F.L.J. (F.C.) 6 : (1939) 1 M.L.J. [4] (1937) A.C. 260.

> It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax the liability to tax arises on the occasion of a sale and a sale has no necessary connection with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactuted or produced it but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory.
>
> In our opinion the power of the Provincial Legislatures to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not; and we regret that we are unable to agree with the contrary opinion which has been expressed by the High Court."

We need only add that the correctness of the decision of the Federal Court in *Boddu Paidanna case*[1], was challenged by the Government of India before the Privy Council, and their Lordships affirmed this decision and pronounced' its reasoning to be correct. *Governor-General in Council* v. *Province of Madras*[2].

If the principle laid down in this case were applied, there is, in our opinion, hardly room for any argument challenging the validity of the tax now levied.

Mr. Bashyam Ayyangar however sought to draw a distinction between the case before the Federal Court and the present and urged that the Federal Court had to deal with a tax imposed on a producer after manufacture whereas here the tax was imposed before the manufacturing operation starts. We see no force at all in his argument. If a tax on the first sale of goods effected by the producer were not a tax on production and therefore not a duty of excise, we consider the the present case *a fortiori*. As the Federal Court explained—an explanation which was affirmed by the Privy Council in the *Governor-General in Council* v. *Provnice of Madras*[2], a duty of excise is under the Indian Constitution a duty on production levied on a producer and grounded on the fact of production, while a sales tax is a tax levied on a dealer on the occasion of a sale. We do not see any basis for the argument that the tax now impugned is a duty of excise.

The only other contention of Mr. Bashyam Ayyangar which remains to be considered is, that the amendment introduced into the Madras General Sales Tax Act by the Amending Act XIII of 1955 offended Article 14 of the Constitution by introducing an unreasonable discrimination between different classes of manufacturers. Learned counsel pointed out that, where a manufacturer purchased his requirements of tobacco from a dealer he did not pay any tax on his purchase, but the manufacturer who purchased from the grower was called upon to pay the purchase tax though he was entitled to a rebate of the identical amount of tax paid when the sales tax payable by him on his sales of tobacco products came to be assessed. This it was urged was an unreasonable discrimination against manufacturers who bought from the growers. We must confess that we are unable to appreciate any force in this argument. A manufacturer who buys tobacco required by him from a dealer does not pay any tax because the tax levied is a single point tax and unless it is to be held that tax levied at a single point is obnoxious to Article 14 of the Constitution—a contention which has only to be stated to be rejected—we do not see any basis for an allegation of discrimination between several classes of manufacturers under the impugned enactment. Learned counsel for the petitioners in W.P. No. 118 of 1956 adopted the arguments of Mr. Bashyam Ayyangar which we have already considered and urged in addition arguments challenging the validity of section 3 (1-A) of the Madras General Sales Tax Act. It would be necessary to set out the provisions of this section which was introduced by the Madras General Sales Tax Act (VIII of 1955). This new section ran :

> " 3. (1-A) : The tax for each year may be assessed, levied and collected in advance during the year in monthly or quarterly instalments, and for that purpose a dealer may be required to furnish either an advance estimate of his turnover for the year, or periodical returns of the actual turnover as may be prescribed. The assessing authority may determine the amount of tax payable in respect

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[1] (1942) F.L.J. (F.C.) 61 : 1942 F.C.R. 90 : (1942) 2 M.L.J. 327 (F.C.).

[2] L.R. 72 I.A. 91 : (1945) F.C.R. 179 : (1945) F.L.J. 69: (1945) 1 M.L.J. 225 (P.C.).

of any period and on such assessment the dealer shall pay the sum demanded within such time as may be fixed by such authority."

The necessity for this amendment arose out of the decision of this Court in *M. P. Kumarawami Raja*, In re[1], to which one of us was a party. Under the Madras General Sales Tax Act, 1939, as it stood before the amendment by Act VIII of 1955, the sales tax was stated to be an annual tax on the total aggregate turnover of each financial year, and therefore the tax did not accrue till the end of the financial year. The Local Government however by rules framed under the Act levied a tax on the monthly turnover of each dealer with a provision for adjustment at the end of the year. A contention that was raised before the Court and which was referred to the division Bench was that the obligation to pay as per the provisional assessment month by month under the rules was inconsistent with the Act. This contention was upheld, and the provisional assessment was quashed. This defect was remedied by an express provision in the enactment in the form of section 3 (1-A) which we have extracted above. In view of the amendment thus effected, an attack grounded that the rules are inconsistent with the Act has been eliminated.

So far as the rules themselves are concerned, there is neither ambiguity nor injustice. The Madras General Sales Tax (Turnover and Assessment) Rules which are the relevant rules provide for submission of returns by dealers regarding their estimated gross and net turnover. If the assessing authority is satisfied about the correctness of the return, the tax is provisionally assessed on that basis (rule 7). As soon as the tax has been provisionally fixed the assessing authority issues a notice to a dealer and the dealer is directed to pay for each month of the year of assessment one-twelfth of the tax provisionally fixed (rule 10). A dealer might elect not to be assessed on this basis of an estimated turnover. Rule 13 provides for an alternative method which is available to the assessee at his option. This alternative method is that the tax is paid on the net turnover for each month the dealer sending a cheque for the tax due along with the submission of his return. In the present case the petitioner in W. P. No. 118 of 1956 did not elect to send the monthly returns under rule 13 but had been assessed on the turnover which he estimated and which estimate was accepted by the assessing authority.

The contention urged by Mr. Raghavachari for the petitioner was that the provisional assessment thus levied upon his client was not in truth a tax on the sale of goods falling within Entry 54 of the State List but was a tax on an anticipated sale which was not within the legislative power of the State. We are clearly of the opinion that this contention is not well-founded. One thing is clear that if the anticipated sales do not take place, no tax liabilty is incurred. In other words if at the end of the year the estimated turnover is not reached the dealer pays a tax only on the actual sales during the year. But this might not conclude the question of the existence or otherwise of the legislative power. It is not in our opinion correct to say that it is a tax on an anticipated sale. On the other hand, it is merely machinery employed for securing to the State the tax due and payable to it.

It has to be remembered that the power confided to the State Legislature under Article 246 (3) in common with other similar power to Parliament by the other sub-sections of the Article is to make laws with respect to the matters specified in the several entries of the State List including Entry 54. The words of the entry designate the centre and not the circumference of the power. If therefore the impugned provision has relevance to or connection with the subject assigned it would be within the State Legislative Power. Again every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject-matter. If a tax liability is certain to arise—a matter not in controversy—a provision designed to ensure that this shall not be evaded is in our judgment clearly within the power to enact a law with respect to taxes on the sale of goods.

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[1] (1955) 1 M.L.J. 299 : I.L.R. (1955) Mad. 1213 : (1955) 6 S.T.C. 113.

This is just on a line with section 18-A of the Indian Income-tax Act and grounded on the same ration. Where the assessee avails himself of the option to be taxed on his monthly turnover under rule 13 there is no factual foundation for any contention that the tax was being collected before the liability for it could be fastened under a power to tax sales.

As pointed out by this Court in *Syed Mohamed & Co.* v. *The State of Madras*[1], a decision confirmed by the Supreme Court,[2]:

> " . . . . advance payment of tax is a well-recognised feature in the mode of realising tax and the provision in rule 15 (2) (corresponding to rule 13) is in accordance with the practice generally obtaining in this branch of the law. In discussing the validity of a somewhat similar provision in a taxing statute of Southern Lowa, the Court observed :
>
> " It is of course true that as the report is required on the twentieth of the calendar month for transactions of the preceding month, there may at times be gasoline received in the month covered by the report which has not been exported by the twentieth of the succeeding month ; but the distributor is entitled to a credit for such exportation in his report made in the next month, and the mere fact that he cannot claim an anticipatory credit for gasoline not yet exported, but intended to be seems to us to be too slight a burden to be of any moment, or to raise a substantial constitutional question. *Monamotor Oil Company* v. *Johnson*[3].

The attack on rule 15 (2) must accordingly fail. Learned counsel for the petitioner however pointed out that in *Syed Mohamed's case*[1], the Court was concerned with the validity of a rule corresponding to rule 13 and not with a provision for assessment under rule 10. It was however clearly open to the assessee to elect to be assessed under rule 13, and if he considered it convenient to be assessed on an estimate which he himself furnished and which itself was an alternative to an assessment under rule 13, we do not see how he could complain about the validity of the tax. If the argument of learned counsel were accepted it would mean that in every case the provisional assessment should be on the basis of rule 13, which would certainly not improve the position of the petitioner who elected not to be governed by it. As we have stated before, the rules relating to provisional assessment are clearly within the legislative power of the State as providing the machinery for ensuring proper collection of the tax due under Entry 54 of the State List.

The result is that all the writ petitions fail and are dismissed. Rules *nisi* issued will be discharged. There will however be no order as to costs in any of these petitions.

R.M. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

M. Kevalchand Sowcar .. *Petitioner**

v.

The State of Madras represented by the Revenue Divisional Officer,
Trivellore (Licensing Authority) and others .. *Respondents.*

Madras Pawn-brokers Act (XXIII of 1943)—Validity—If opposed to Articles 14 and 19 (1) (g) of the Constitution.

Neither the Madras Pawn-brokers Act as a whole nor any of its provisions offends Article 14 of the Constitution. The classification of pawnbrokers as a special class of money-lenders is reasonable and the classification has a reasonable and just relation to the object of the Act. Within the class of people to which the provisions of the Act apply the Act makes no differentiation. Nor do the provisions of the Act impose an unreasonable restriction on the right to carry on business. None of its provisions offend Article 19 (1) (g) of the Constitution. Sections 3 (2), 4 (2), 5 (a), 6 (1) 10 (1) and (2), 11, 12 (3), 13 (1), 15, 17 (2) and 20 of the Act are all valid and do not amount to unreasonable restrictions on the right to carry on business.

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[1] (1952) 2 M.L.J. 598 (613): (1952) 3 S.T.R. 367.

[2] (1954) 2 M.L.J. 619 (S.C.) : (1954) S.C.J. 390.

[3] 292 U.S. 86 ; 78 L. Edn. 1141.

*W.P. No. 899 of 1955. 3rd August, 1956.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or any other appropriate writ, order or directions to the Sub-Magistrate of Poonamallee, the third respondent herein to refrain from proceeding with the enquiry initiated under section 15 (1) of the Pawn-brokers Act, 1943 (Madras Act XXIII of 1943) in Calendar Case No. 4128 of 1955, on the file of his Court, after calling for the records and declaring the said Act, or in particular sections 3, 4, 6, 10, 13 and 20 of the said Act *ultra vires* of the Constitution of India.

A. Seshachari and *A. Venkatachari*, for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) on behalf of the Respondents.

The Court made the following

ORDER.—The petitioner is a pawnbroker, who has obtained a licence under the provisions of the Madras Pawn-brokers Act (XXIII of 1943). The relief, the petitioner asked for in the application he filed under Article 226 of the Constitution is the issue of a writ of *mandamus* or any other appropriate writ to restrain the Sub-Magistrate of Poonamallee, from proceeding with the enquiry against the petitioner initiated under section 15 (1) of the Pawn-brokers Act. The constitutional validity of the Pawn-brokers Act (hereinafter referred to as the Act) was challenged by the petitioner ; and in particular he challenged the constitutional validity of sections 3, 4, 6, 10, 13 and 20 of the Act. During the arguments, however, the validity of other sections of the Act also was assailed.

It may not be necessary to set out the events that led upto the institution of these proceedings by the petitioner. The question debated before me was, whether the Act as a whole or at least many of its provisions are void and unenforceable, and whether they come within the ban imposed by Article 13 of the Constitution. The petitioner contended that the Act as a whole was discriminatory since it singled out only pawn-brokers among money-lenders for discriminatory treatment. That, the petitioner contended, brought the Act as a whole within the mischief of Article 14 of the Constitution. Even if Articele 14 was not contravened, the petitioner urged, many of the provisions of the Act offended Article 19 (1) (*g*) of the Constitution.

The Madras Pawn-brokers Act was enacted in 1943, at a period when the legislative functions of the province of Madras vested in the Governor under the provisions of the Government of India Act, 1935. The Preamble to the Act ran :

> " Whereas it is expedient to make provision for the regulation and control of the business of pawnbrokers in the Province of Madras it is hereby enacted as follows :

It is permissible to understand the scope of the Preamble in the light of the Statement of Objects and Reasons, which ran :

> " Many pawnbrokers, especially in urban areas, are suspected of receiving stolen property and there is a marked reluctance on their part to reveal the source from which the property is received by them. The account books of some pawnbrokers are now written in a script not current in this province and this adds considerably to the difficulty of preventing them from making an illegitimate use of their position. The Government therefore considered it necessary to enact a measure requiring pawnbrokers in this province to take out licences and subjecting their operations to a due measure of control on the lines of the English Pawn-brokers Act, 1872 ".

Consistent with the object set out to control the business of pawnbrokers, principally in urban areas, section 1 (3) of the Act vested in the State Government the power to apply the provisions of the Act other than section 1 to the whole or any portion of the State of Madras by notification. Though the mischief sought to be prevented by the Act was noticeable in the past mostly in urban areas, the operation of the Act was not confined by the enactment itself to urban areas.

It is against this background that I have to consider the question mooted by the learned counsel for the petitioner, whether the Act as a whole falls within the mischief of Article 14 of the Constitution. *Prima facie*, the Act is a discriminatory piece of legislation, since pawnbrokers alone even among money-lenders have been subjected to the control and regulation prescribed by the Act. The defence to the charge of discrimination was reasonable classification. If that prevails, the apparent discrimination will not be unconstitutional, and the enactment will fall outside the ban imposed by Article 14 on discriminatory legislation.

It may not be necessary to review at this stage the case-law on the subject. What constitutes reasonable classification has been fairly well-settled now by the decisions of the Supreme Court.

" Pawnbroker " is defined by section 2 (6).

> " Pawkbroker means a person who carried on the business of taking goods and chattles in pawn for a loan ;
>
> *Explanation.*—Every person who keeps a shop for the purchase or sale of goods or chattels and who purchases goods or chattels and pays or advances thereon any sum of money, with or under an agreement or understanding expressed or implied that the goods or chattels may be afterwards repurchased on any terms is a pawnbroker within the meaning of this clause."

The expression "Loan" is defined by section 2 (5) of the Act :

> "Loan" means an advance of money or in kind at interest, and includes any transaction which the Court finds in substance to amount to such an advance. . . . . ."

I shall leave out for the present *Exceptions* (i) to (v) specified in section 2 (5) of the Act.

Pawnbrokers constitute a section of money-lenders, persons who advance loans. Pawnbrokers also constitute a sub-section of money-lenders who advance loans on the security of the moveable property of the borrower. Pawnbrokers constitutes a definite ascertainable class of persons, subject to the exceptions for which the Act provided. This class of money-lenders has been subjected to statutory control by the impugned Act. Whether the enactment is based on a reasonable classification is the question.

The Statement of the Objects and Reasons for the enactment, which I have extracted, above should suffice to uphold the claim of the Government, that the classification is reasonable, and that the apparent discrimination is not unconstitutional. Facilities for disposal or concealment of stolen property, which necessarily implies movable property—goods or chattels is the statutory expression—are obviously more pronounced in the case of pawn-shops than in the case of other money-lenders. That was the primary mischief the enactment sought to rectify by imposing statutory control on the money-lending activities of the pawnbrokers. The other mischief the Act was designed to rectify, as explained in the Statement of Objects and Reasons, was that some of the pawnbrokers maintained their accounts in a script not current in the State of Madras. It is common knowledge that for a considerable time the class of people, popularly known as marwaris, has to a considerable extent monoplised the business of pawnbrokers, at least in Madras and many other urban areas. Naturally they maintain records in their own language. That, according to the Government facilitated the concealment of their nefarious activities, if any of them embarked on such activities. It is not necessary to establish that all pawnbrokers are dishonest. If the business and the method in which it was conducted facilitated dishonesty, an Act designed to control, if not altogether terminate, the dishonest practices which had developed in the business cannot be said to be unconstitutional, because restrictions were imposed only on one class of money-lenders. The classification has a reasonable and just relation to the object of the Act even as disclosed in the Statement of Objects and Reasons.

The Statement of Objects and Reasons may not be conclusive, or even exhaustive of the grounds on which the reasonableness of the classification could be sustained. It is again common knowledge, that a large number of poor and needy persons have to resort to pawn-brokers, and that unlike banks and co-operative societies, for instance, a pawnbroker has a natural advantage in dictating the terms on which he is prepared to lend money. Usurious rates of interest were not uncommon, in that class of business. Very often the borrower is unable to redeem the pledged goods. Sooner or later he loses the goods themselves. Dishonest disposals of property by faked auctions were not uncommon either. It may not be necessary to set out many of the other evils that attached themselves to this line of business, which got into the hands of a comparatively limited class of persons. I think I have said enough to indicate that there was every justification for imposing statutory control over the business of pawnbrokers in the State. The classification of pawnbrokers for purposes of legislation as I have pointed out, bore a just and reasonable relation to the object of the enactment.

The learned counsel for the petitioner pointed out that, even within the class of persons who satisfied the definition of "pawnbroker" in section 2 (6) of the Act, a further discrimination was made. The definition of "loan" in section 2 (5) of the Act excluded from the operation of the Act, advances made by a co-operative society and a banking company. It also excluded deposits with an incorporated company or co-operative society. It may not be necessary to set out the other exceptions for which section 2 (5) provides. In addition, under section 21-A, the State Government has been invested with a power to exempt from any of the provisions of the Act, any company incorporated under the Indian Companies Act, 1913, before 1st November, 1944. It should be noted that, even if this further discrimination be held unconsitutional, that cannot by itself invalidate the Act as a whole. If, for instance, the statutory exemptions for which section 2 (5) provides and the power to exempt vested in the Government by section 21-A of the Act are held unconstitutional, those statutory provisions obviously severable from the main Act, will cease to be enforceable. That would still leave the rest of the Act intact.

The further classification effected by the statutory exemptions provided by section 2 (5) of the Act can also be justified on the ground of reasonable classification. If that be the case, there can be no proved charge of denial of equal protection of laws, prohibited by Article 14 of the Constitution. No doubt, but for the statutory exemptions, a banking company and a co-operative society lending money on the pledge of movable property will fall within the definition of "pawnbroker" in section 2 (6) of the Act. But they have been excluded from the scope of the whole Act by section 2 (5) of the Act. The reason for this differentiation is obvious. The co-operative societies and the banking companies are already subject to regulation and control by appropriate enactment. The dishonest disposal of stolen properties, one of the main evils the Act was designed to prevent, would not be easy in the case of co-operative societies and banking companies. Even it it occurs in exceptional cases, detection under the scheme of control and regulation imposed by the appropriate enactments should be easy. The Act itself does not exempt loans advanced by all the companies incorporated under the Indian Companies Act. The power of exemption in such cases is granted to the Government by section 21-A of the Act. A power of exemption by itself may not amount to unconstitutional discrimination (See *Globe Theatres* v. *State of Madras*[1].)

In my opinion, neither the statutory exemptions for which section 2 (5) of the Act provided, nor the statutory power to grant exemptions in favour of companies incorporated under the Indian Companies Act vested in the State Government by section 21-A amount to an unconstitutional discrimination against the rest of the class of persons engaged in the business of pawnbrokers.

In my opinion neither the Act as a whole nor any of its provisions offends Article 14 of the Constitution.

Within the class of people to which the provisions of the Act apply, the Act makes no differentiation. There is no denial of equal protection of laws within that class. That class, as I have pointed out earlier, is easily ascertainable, and it constitutes a known and definite section of persons who carry on the business of money-lending.

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[1] (1954) 2 M.L.J. 110.

The next charge to be investigated is, whether any of the provisions of the Act constitutes an unconstitutional abridgment or infringement of the fundamental right to carry on business, guaranteed by Article 19 (1) (*g*) of the Constitution. Here again, the curtailment of the right of a person to carry on the business of a pawnbroker is apparent. The Act subjects his money-lending actitivites to control and regulation. The real question, is, are these restrictions, and do they fall within the scope of sub-clause (6) of Article 19 of the Constitution ?

It may not be necessary to review the case-law to ascertain the tests to be applied to decide whether a given statutory restriction on the exercise of any of the fundamental rights guaranteed by Article 19 (1) (*g*) is reasonable. It was a well-settled principle that Mahajan, C.J., referred to in *Cooverjee B. Barucha* v. *Excise Commissioner and the Chief Commissioner, Ajmer and others*[1].

> "Article 19 (1) (*g*) of the Constitution guarantees that all citizens have the right to practice any profession or to carry on any occupation or trade or business and clause (6) of the article authorises legislation which imposes reasonable restrictions on this right in the interests of the general public. It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trade can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injuries to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualifications in the parties permitted to use, manufacture or sell them."

I have already referred to some of the features of the business of pawn-brokers carried on in this State, especially in urban areas. I have also referred to the evils which grew up, which the State intended to minimise and control, if not altogether eradicate, by the statutory regulations imposed by the impugned Act. The poverty of the class of debtors who generally seek loans from pawnbrokers and the helplessness of those debtors which compels them to submit to even unreasonable terms of the creditor have already been adverted to by me. Under such circumstances, that the freedom of contract is controlled is by itself no proof of a charge of unreasonableness of the restriction to carry on business, unreasonableness which would rob the statutory restriction of its consitutional validity. It is with reference to these general considerations that I shall examine the provisions of each of the impugned sections of the Act ; The attack by the learned counsel for the petitioner was to some extent enlarged beyond the scope of the enumeration in the petition itself, during the arguments before me.

Section 3 in effect requires every pawnbroker in the area, to which the Act has been extended by notification by the Government under section 1 (3) of the Act, to take out a licence every year for every shop of his. The licence has to be granted every year, and section 3 (2) specifically provides that it may be renewed from year to year. It is too late in the day to urge that the liability to take out a licence, though it constitutes a restriction on the right to carry on business, by itself constitutes an unreasonable restriction on that right. The reasonableness of the statutory obligation to take out a licence has to be viewed against the background of the conditions of the trade and the evils attendant on it, to which I have already referred, and also with reference to the provisions of section 4 of the Act. Section 4 (2), the validity of which was also impugned, lays down :

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1. (1954) S.C.R. 873 at 879 : (1954) S.C.J. 246 : A.I.R. 1954 S.C. 220 (S.C.).

> " The licence shall not be refused except on one or both of the following grounds, namely.
>
> (a) that the applicant is of bad character.
>
> *Explanation.*—If any evidence of bad character is adduced against the applicant, he shall be given an opportunity of rebutting such evidence ; and
>
> (b) that the shop or place at which he intends to carry on the business of a pawnbroker or an adjacent house or shop or place, owned or occupied by him, is frequented by thieves or persons of bad character."

Thus, while an obligation is laid by the Act on the pawnbroker to take out an annual licence, the obligation to grant the licence sought is laid on the licencing authority specified in section 4 (1) of the Act, and the right to refuse a licence is defined with apparent precision. The real question is not whether the obligation to take out a licence constitutes an unreasonable restriction, but whether section 4 (2) which provides for refusal of the licence in the contingencies specified therein, constitutes an unreasonable restriction.

No doubt the learned counsel for the petitioner urged that the obligation to take out an annual licence is itself unreasonable. But I am unable to see any real substance in this objection.

With reference to section 4 (2) (*a*) which provides for refusal of a licence if the applicant is of bad character, the learned counsel for the petitioner pointed out that what constitutes bad character has not been defined by the statute itself, and he urged that, apart from the character of the applicant being an irrelevant consideration in deciding whether he should be granted a licence or not, the absence of a statutory definition made the test vague in its application, which by itself should suffice to prove that it is an unreasonable requirement. No doubt what constitutes bad character is not defined by the Act itself. Obviously it is an objective and not a subjective test for which section 4 (2) (*a*) of the Act provides. But then, it should be remembered, that it is the licencing authority that has to decide whether an applicant is of bad character within the meaning of section 4 (2) (*a*). The licencing authorities are the Collector of Madras within the City of Madras and the Revenue Divisional Officers in the districts. It should be remembered that the Act is of the year 1943, when the departmental interdependance of the police and the revenue officers in the maintenance of law and order was even more pronounced than it is now. The Act itself provides for a large measure of control to be exercised by the police over the actiivities of pawnbrokers. The concept of a bad character was and continues to be a well-known one both to the officers of the police department and the officers of the revenue department, who are excepted to and do work in unison with the police in maintaining law and order. To a revenue officer or a police officer, a B.C. (Bad Character) connotes something definite. Indeed it should be common knowledge that every police station maintains a register of reputed bad characters. In addition, in every village, under the immediate administrative control of the officers of the revenue department, the village Munsif is obliged to maintain register of bad characters of that village, which register is subject to periodical scrutiny by the officers. I am not for a moment implying that unless the name of a person is found in one of those registers, he should not be viewed as a person of bad character within the meaning of section 4 (2) (*a*) of the Act. All that I have endeavoured to show is that there is something definite in the concept of bad character, well ascertained and ascertainable by the licencing authority specified in section 4 (1) of the Act. It should also be remembered that section 4 (2) (*a*) provides that before the licence applied for is refused on the ground that the applicant is a reputed bad character—the statutory expression used, no doubt, is ' the applicant is of bad character '—the applicant has to be given a reasonable opportunity to meet such a charge, and to prove to the satisfation of the licencing authority that the charge in fact is not true. That against is a clear indication that it is an objective test, to be supported by evidence, that the Act has provided for, and that there is really nothing vague about it. Considering that one of the evils the Act intended to control was the dishonest disposal of stolen properties through pawn-shops, the statutory disqualification of bad character cannot be viewed as constituting an unreasonable restriction on the activities of a pawnbroker.

Section 4 (2) (*b*) is even more precise in its scope than section 4 (2) (*a*) of the Act. Section 4 (2) (*b*) provided for two contingencies, in either of which a licence may be refused ; (1) that the shop or place at which the applicant intends to carry on the business of a pwanbroker is frequented by thieves or persons of bad character, and (2) that a house, shop or place, owned or occupied by the applicant, which is adjacent to the shop or place at which he intends to carry on the business of pawnbroker, is frequented by thieves or persons of bad character. In either case, facilities afforded to thieves or persons of bad character would be one of the factors for consideration. A further requirement is that these facilities have been afforded by the applicant for a licence. It is not the mere proximity to any house resorted to by thieves or persons of bad character that disqualifies the applicant. The premises resorted to by thieves or persons of bad character where these premises are used for the conduct of the business of a pawnbroker or where these premises are adjacent to the pawnbroker's shop, must belong to the applicant himself, which would mean he has a reasonable amount of control over those premises, to prevent access to thieves or persons of bad character. I have already dealt with what the statutory expression " person of bad character " connotes in the context of the Act. There is certainly nothing vague about the concept of a thief. Once again I have to point out that the Act was designed to prevent or at least to control disposal of stolen property, which is certainly not an unreasonable objective. It is the duty of the State to protect the interests of the public. It is with reference to this objective the reasonableness of the restriction imposed by section 4 (2) (*a*) has to be judged, and, judged in the light, I have no hesitation in holding that section 4 (2) does not impose an unreasonable restriction.

Apart from the easily understood and applied tests prescribed by sections 4 (2) (*a*) and 4 (2) (*b*), section 4 (3) provides for a right of appeal against the refusal of a licence. That is another factor to establish the reasonableness of the restriction imposed by section 4 (2) of the Act.

The learned Counsel for the petitioner contended that the requirements of section 5 (*a*) constituted a further unreasonable restriction. Section 5 (*a*) runs :—

> " 5. Every pawnbroker shall—
>
> (*a*) always keep exhibited in large characters over the outer door of his shop or place of business his name with the word Pawnbroker, in the chief language of the locality."

Frankly, I am unable to perceive anything unreasonable in that statutory provision. The learned Counsel for the petitioner, as I understood him eventually, said that the statutory requirement that the name should be in large characters was unreasonable. The argument has to be only stated in that form to be repelled without anv further serious consideration. All that section 5 (*a*) requires is that there should be no difficulty in identifying a pawnbroker's shop, and it prescribes a name board for that shop. That is not unreasonable.

Section 6 (*a*) of the Act prescribes the statutory upper limit on the rate of interest a pawnbroker may charge on the loans advanced by him. It is nine and three-eighth per cent. per annum simple interest where the loans are of Rs. 25 and below, and six and a quarter per cent. per annum in other cases. *Prima facie*, a statutory control of the rate of interest does abridge the freedom of contract. Freedom of contract can be claimed as incidental to and in fact necessary for carrying on any business, including that of pawnbroker. The question however is, is it an unreasonable restriction, unreasonable enough to take it outside the scope of Article 19 (6) of the Constitution. My answer to that question, with reference to section 6 (1) of the Act, is in the negative. Statutory control of interest on loans advanced by money-lenders is nothing new. Legislative practice in the past sanctioned it. Even after the Constitution came into force, the validity of such legislative controls has been upheld by the Courts. Such legislative controls have been designed in the interests of the public. I have already adverted to the type of poor, needy and helpless persons that are driven to the pawnbrokers' shops for raising small loans to tide over their immediate difficulties. The statutory maxima, by themselves not unreasonable, were designed in the interests of that section of the public. The learned Government Pleader referred to *Krishnamoorthy* v. *Venkateswaran*[1], where a Bench of this Court upheld the constitutional validity of an analogous provision in the Madras Agricultursts Relief Act (Act IV of 1938). In my opinion the statutory maxima prescribed by section 6 (1) of the Act do not constitute an unreasonable restriction on the right of the pawnbroker to carry on his business.

The next set of provisions the validity of which was attacked were those in section 10 of the Act. Section 10 (1) (*a*) requires a record of the transactions to be maintained in the prescribed form and referred to as the pledge book, and the details to be entered in that book have also been specified in sub-clauses (i) to (v). Section 10 (1) (*b*) prescribes some of the other records to be maintained by a pawnbroker. These are really records which a pawnbroker should, in the ordinary course of his business, maintain both in his own interests and in the interests of his customers. I am unable to see anything *per se* unreasonable in the statutory provision requiring the maintenance of the specified records. As I understood the learned Counsel for the petitioner, his grievance was that insistence in effect on the maintenance of a ledger in addition to a day-book of the transactions of the pawnbroker constituted an unreasonable restriction on the right of the pawnbroker to carry on his trade. Apart from the fact, that such an argument may not deserve any further serious consideration, there is this feature to be remembered. The maintenance of a record of the transactions in the ledger form will facilitate the discharge of the statutory duty imposed on the pawnbroker by section 10 (1) (*d*) of the Act, the validity of which was not really challenged. The borrower or pawnor has been given a statutory right, subject to the restrictions specified in section 10 (1) (*d*), to a copy of the record of the transaction of loan, and compliance with the corresponding statutory duty laid on the pawnbroker would certainly be easier, if a record is maintained in the form of a ledger.

Section 10 (2) of the Act requires that all records or entries made in the books, accounts and documents referred to in section 10 (1) of the Act shall be either in English or in such language of the locality as may be prescribed, *i.e.*, prescribed by the Government as the rule-making authority. I have already pointed out that even the Statement of Objects and Reasons recorded that a number of pawnbrokers in this State maintained their accounts in a language and script, with which the residents of the locality were not familiar. The learned Counsel for the petitioner pointed out that many of the pawnbrokers belonged to the community popularly, if not correctly, referred to as Marwaris, and he urged that many of them were ignorant of English or of the regional language in which section 10 (2) of the Act compelled them to maintain their records. The learned Counsel urged that in such circumstances section 10 (2) must be struck down as imposing an unreasonable restriction on the freedom of the pawnbroker to carry on his business. Is the restriction unreasonable is the question. Is it a restriction on the pawnbroker's right conceived in the interests of the public or a section thereof? The Act was designed among other things to control the nefarious activities, if any, of some pawnbrokers, who facilitated the disposal of stolen property. The Statement of Objects and Reasons pointed out that the maintenance of the books of account by a pawnbroker, in a language not in current use in the locality in which he carried on his business, made detection of offences of disposal of stolen properties more difficult. Even if the restriction imposed by section 10 (2) was designed to facilitate maintenance of law and order, that would be sufficient to bring it within the scope of Article 19 (6) of the Constitution. There is also another factor to be considered. I have already adverted to the statutory right created by section 10 (1) (*d*) of the Act; the validity of which was not in fact challenged by the petitioner. In my opinion, it is also unchallengeable. The debtor has a right to know how he stands with his creditor. To give an extract of an account, if it is maintained, say in Gujarathi, script, would be sufficient compliance with section 10 (1) (*d*), but it would in no way help a debtor unfamiliar with that language. The pawnbrokers even of the Marwari group constitute, no doubt, a section of the community. The debtors constitute another section of the community, a much larger section. If in its wisdom, the legislature chose to provide for the protection of the larger community of debtors, and in that endeavour chose to prescribe what *prima facie* appears to be a restriction on the right of the pawnbroker to maintain his accounts in his own language, it is not for the Courts to say that it constitutes an unreasonable restriction outside the purview of Article 19 (6) of the Constitution.

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[1] (1951) 2 M.L.J. 366 : I.L.R. (1952) Mad. 604 : A.I.R. 1952 Mad. 11.

The second part of section 10 (2) came in for an even more concentrated attack at the hands of the learned counsel for the petitioner. That portion of section 10 (2) runs :

> " . . . and all such books, accounts and documents and all pledges taken by the pawnbroker shall be open to inspection at any time by any Police Officer not below the rank of Sub-Inspector or by any Head Constable authorised in writing by such Police Officer."

The learned Counsel for the petitioner urged that the statutory right given to the police, to enter into the premises of a pawnbroker at any time, to carry out an inspection of the records of the pawbroker, constituted an unreasonable restriction on the right of the pawnbroker to carry on his lawful activities in his business as a pawnbroker. At first sight the contention does appear to be well founded. The learned Counsel for the petitioner conjured up the vision of a midnight inspection by a police officer. That would certainly appear to be an unreasonable one. But does the section really authorise such inspections, despite the use of the expression "at any time"? It must be remembered that the second part of section 10 (2) as it stands would appear to be primarily designed to provide for a supervision even over the lawful activities of a pawnbroker. If any given pawnbroker was suspected, for instance, of having received stolen properties, the power of police to search the premises could be founded on the provisions of the Criminal Procedure Code. In my opinion, section 10 (2) does not appear to have been designed for such purposes. Neither section 10 (2) by itself nor any other provision of the Act authorises the police to effect forcible entry into the premises of a pawnbroker by breaking open, for example, premises which have been locked. As I have pointed out, the police have ample powers under the Criminal Procedure Code, where a pawnbroker is suspected of carrying on illegal activities, that is, activities illegal under enactments other than the Pawnbroker's Act itself. That was apparently why no specific provision was made in the Act itself to give a right to the police to search the premises of the pawnbroker with or without a warrant, where there is reason to suspect that the pawnbroker has committed offences, for example, cognisable offences, punishable under any of the sections of the Penal Code. It is in this context that the expression "at any time" in section 10 (2) will have to be construed. In the context of section 10 (2) taking the scheme of the Act as a whole also into consideration, the expression "at any time" in section 10 (2) could only mean 'at any time when the pawnbroker's premises are normally kept open for business.' Interpreted in that light, there is nothing unreasonable in the right conferred on the police to carry out inspection of the records in a pawnbroker's shop.

In my opinion, neither part of section 10 (2) constitutes an unreasonable restriction on the right of a pawnbroker to carry on his business.

Section 11 of the Act also came in for criticism at the hands of the learned counsel for the petitioner. That section provides in the case of loans below Rs. 10, a minimum statutory period within which the debtor could redeem the pledge. It also in effect adds a period of seven days grace to the contract period. The learned counsel for the petitioner contended that such a statutory provision constituted an unreasonable restriction on the pawnbroker's right to carry on his business. The learned counsel illustrated his point by an example. If a pawnbroker wanted to discontinue his business at any given point of time, he could not insist on the redemption of all pledges by his customers. Even if the contracts provided for such a contingency he had to wait till all the pledges were cleared within the time allowed by section 11 of the Act. I have pointed out at more than one place in this judgment that every statutory restriction on the freedom of contract, which is part of the fundamental right to carry on business guaranteed by Article 19 (1) (*g*) of the Constitution is not *per se* unreasonable. In applying the test of reasonableness it is the interest of the public or a section thereof that is made relevent by clause (6) of Article 19 of the Constitution; the interests to be visualised are not only those of the pawnbroker. Section 11 as it stands does not really compel a pawnbroker to continue his business against his wishes. The statute safeguarded the rights of his debtors. That the legislature was entitled to do. I am unable to see anything unreasonable in the statutory conditions imposed by section 11 of the Act.

The attack on the validity of section 12 (3) of the Act was on the lines analogous to those on which the validity of section 11 was challenged. Section 12 (1) provides for the disposal of the pledged article by auction but not otherwise.

> " At any time within three years after the public auction, the holder of the pawn-ticket may inspect the entry relating to the sale either in the pawnbroker's book or in such catalogue of the auction as may be prescribed ".

Here again the learned counsel for the petitioner contended that in effect even if the pawnbroker decided to discontinue his business, he would have to maintain the records of his erstwhile business for at least a period of three years, to discharge the statutory obligation laid upon him by section 12 (3) of the Act. Conceived obviously in the interests of a larger section of the public other than the pawnbrokers, the debtors, section 12 (3) does not, in my opinion fall outside the scope of Article 19 (6) of the Constitution.

Section 13 (1) runs :

> " Where a pledge is destroyed or damaged by or in consequence of fire, the pawnbroker shall nevertheless be liable on application made within the period during which the pledge would have been redeemable, to pay the value of the pledge, after deducting the amount of the principal and interest ".

Section 13 (2) entitled the pawnbroker to insure the goods in his custody to the extent of the value so estimated, but there was no specific statutory provision to indicate who should bear the expenses of such insurance. The learned counsel for the petitioner contended that section 13 (1) imposed an unreasonable liability on the pawnbroker. Even if the fire, which destroyed the goods, was due to no negligence of the pawnbroker and was due to causes over which he had no control, the statutory liability imposed by section 13 (1) of the Act would come into play. But then, it must be remembered that the debtor has a subsisting interest in the articles he has pawned and he is entitled to redeem those articles under the terms of the contract with the pawnbroker. It is basically that right that section 13 (1) is designed to safeguard. No more than any of the other sections I have considered so far does section 13 (1) constitute an unreasonable restriction on the pawnbroker's right to carry on his business.

The validity of section 15 of the Act should really be linked up with that of section 6 for the contravention of which penalities have been provided in section 15. As I have already upheld the validity of section 6 it follows the constitutional validity of section 15 also is unassailable.

Section 17 (2) of the Act was the next statutory provision the validity of which the learned counsel for the petitioner challenged. Section 17 (1) in effect penalised a person who pawns an article not belonging to him, virtually on false representations. Section 17 (2) runs :

> " In every case falling under sub-section (1), and also in any case where, on an article being offered in pawn, for sale, or otherwise, to a pawnbroker he reasonably suspects that it has been stolen

or otherwise illegally or clandestinely obtained, the pawnbroker shall, in the absence of reasonable excuse, inquire into the name and address of the person concerned and seize and detain such person and the article, if any, and forthwith communicate to the nearest police station the facts of the case and shall deliver the person and the article, if any, seized to the police ".

The statutory obligation with a corresponding statutory right to seize and detain does not in my opinion, constitute an unreasonable restriction on the pawnbroker's right to carry on his business. Surely it is not claimed by the petitioner that he has a right, fundamental or otherwise, to facilitate the disposal of stolen property. One of the objects of the control imposed by the Act was to prevent clandestine disposal of stolen property. That, as I have already pointed out, was conceived in the interests of the society as a whole. The State was bound to provide safeguards against the commission of such offences. There is certainly nothing unreasonable in the State imposing an obligation on a citizen to give information to the police, entrusted with the duty of maintaining law and order, when a citizen has reasonable grounds to believe that a cognisable offence like theft or disposal of stolen property has been committed. It is only that normal duty of a citizen that has been converted into a statutory obligation under the limited circumstances specified in section 17 (2) of the Act. I have no hesitation in rejecting the contention of the learned counsel for the petitioner, that section 17 (2) imposes an unreasonable restriction on a pawnbroker.

The last of the sections the validity of which was challenged was section 20 which runs :

> " Any police officer may arrest without a warrant any person committing in his view an offence against this Act ".

The basis for the argument of the learned counsel for the petitioner that this statutory right given to the police was an unwarranted restriction of the pawnbroker's fundamental right to carry on his business, was the interpretation the learned counsel placed on the expression " in his view " as it occurs in section 20. The learned counsel interpreted that to mean " in the opinion of the police officer ". That construction of the expression " in his view " is, in my opinion untenable. As the learned Government Pleader pointed out, the expression " in his view ", should obviously be construed as " in the immediate presence of a police officer ". A statutory provision enabling a police officer, whose primary duty is maintenance of law and order to arrest without a warrant when a person commits an offence in the presence of the police officer cannot be challenged as unreasonable in its scope. Obviously no person can claim a right to commit an offence made punishable by a statute whether the offence is committed in the presence of a police officer or even otherwise. Section 20 gives a limited right to the police officer to arrest a person without a warrant, if that person commits an offence made punishable under the Act itself, the Pawnbrokers Act.

The learned Government Pleader referred to *Gikul Tatwa* v. *Emperor*[1], and *Abdul Aziz* v. *Emperor*[2], where the learned Judges had to construe the statutory expression " in his view " in section 59 of the Criminal Procedure Code. The learned Judges held that that expression meant that the offence had been committed in the presence of the police officer or within his sight. I respectfully agree with that interpretation placed on the statutory expression " in his view "; and that should be the interpretation placed on that expression as it occurs in section 20 of the Act. The learned counsel for the petitioner realised that, if that was the limited scope of the power conferred on a police officer by section 20 of the Act, its validity could not really be challenged.

Thus none of the statutory provisions, the constitutional validity of which the learned counsel for the petitioner challenged, falls outside the scope of clause (6) of Article 19 of the Constitution. None of the provisions therefore offends

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[1] A.I.R. 1926 Pat. 53.

[2] A.I.R. 1933 Pat. 508.

Article 19 (1) (*g*) of the Constitution. The question whether any of the statutory provisions is severable, therefore does not arise for consideration.

Neither the Act as a whole nor any of the provisions thereof is invalid and unenforceable.

The learned Government Pleader objected to the maintainability of the petition itself He pointed out that the petitioner had obtained a licence under the Act and it was not thereafter open to him to challenge in these proceedings under Article 226 of the Constitution the validity of the Act or any of its provisions subject to which he sought and obtained a licence. In view of the fact that I have upheld the validity of the Act, there is no need to pronounce any opinion on this contention of the learned Government Pleader.

The rule *nisi* is discharged and the petition is dismissed with costs. Counsel's fee Rs. 100.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

V. Rangaswami Naidu .. *Applicant**

v.

The Commissioner of Income-Tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922), section 2 (4-A) and section 12-B—Right of partner in a partnership which had a Managing Agency—Whether a capital asset liable to be taxed.

A share in a partnership is a profit-yielding asset and is property within the meaning of section 2 (4-A) of the Income-tax Act. The congeries of rights which the assessee enjoyed under the agreements that gave him a transferable right and which for a price he conveyed constituted a capital asset liable to be assessed under section 12-B.

Case-law discussed.

Case referred to the High Court by the Income-Tax Appellate Tribunal, under section 66 (1) of the Indian Income-Tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-Tax (Amendment) Act, 1939 (Act VII of 1939), in R. A. No. 987 (Madras) of 1952-53 on its file for decision.

M. Subbaraya Ayyar, V. Sethuraman and *S. Padmanabhan* for Applicant.

C. S. Rama Rao Sahib, Special Counsel, for the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The assessee and V. Gopal Naidu were partners in each of the three partnership concerns (1) R.G.S. Naidu and Co., (2) T. A. Ramalingam Chettiar Sons and Company and (3) A. G. Guruswami Naidu and Company. R.G.S. Naidu and Company were the Managing Agents of the Coimbatore Spinning and Weaving Company Limited. T. A. Ramalingam Chettiar Sons and Company were the Managing Agents of Sri Murugan Mills, Ltd. A.G. Guruswami Naidu and Company were the Managing Agents of Sri Radhakrishna Mills, Limited.

Clauses 8 and 9 of the deed of partnership of R.G.S. Naidu and Company ran:

> "8. The partners shall have an individual right to sell or mortgage his share or interest in the partnership, but such partner before selling or mortgaging it to a stranger shall make the offer by due notice to each of the other co-partners who shall have the first option to purchase the share at a valuation determined by all the partners or their assigns for the time-being.
>
> "9. But in case a stranger purchases the share of any of the partners, the mode of conducting the business and the interference in the business of this firm shall be at the option of the original partners or their assigns or successors remaining then".

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* Case Referred No. 74 of 1953. 18th January, 1957.

The deed of partnership of T. A. Ramalingam Chettiar Sons and Company gave even wider rights. Clause (6) of that deed ran :

> " We six each can sell his right in the partnership to anyone agreed to by the other partners. The person buying will get all the rights and be a partner in his place ".

In the case of A. G. Guruswami Naidu and Company the preamble itself recited :—

> " We agree individually to the agreement hereby entered into *viz.*, each of us or the heirs or assigns of each . . . ."

R. G. S. Naidu and Company were the Managing Agents of the Coimbatore Spinning and Weaving Company Limited. Clause (16) of the Managing Agency Agreement between the company and the partnership firm provided :

> "It shall be lawful for the said firm to assign this agreement and the rights of the said firm hereunder to any person, firm or company . . . . and upon such assignment being made and notified to the said company, the said company shall be bound. . . . . to recognise the person or firm or company aforesaid as the agents and secretaries. . . . in lieu of the said firm."

Clause (19) of that agreement ran :

> " It shall be lawful for any member of the said firm to assign the whole or any portion of the interest in the said firm or to withdraw from the said firm altogether without thereby in any way affecting the appointment of the said firm as such agents and secretaries as aforesaid ".

In paragraph 2 of the Statement of the Case it was recorded :

> " The assessee's share in R. G. S. Naidu and Company was transferred in favour of Gopal Naidu in exchange for the latter's shares in T. A. Ramalingam Chettiar Sons and Company and A. G. Guruswami Naidu and Company under an agreement entered into between the assessee and Gopal Naidu on 30th April, 1946. The transfer itself was to take effect from 1st April, 1946. As a condition of the transfer, Gopal Naidu paid Rs. 1,00,000 in cash in addition to the shares held by him in the other two firms and transferred by him to the assessee ".

No document was placed before us to evidence these transfers, but that these were the terms of the transfer was never in dispute.

The departmental authorities treated this sum of Rs. 1,00,000 received by the assessee as capital gains, liable to tax under section 12-B of the Income-Tax Act in the assessment year 1947-48 for the corresponding account year of the assessee ending with 31st March, 1947. The assessee appealed without success to the Appellate Tribunal.

The Appellate Tribunal referred the following questions to this Court under section 66 (1) of the Act :

> "1. Whether the sum of Rs. 1,00,000 received by the assessee during the year of account can be assessed to tax under the provisions of section 12-B of the Indian Income-Tax Act ; and
>
> 2. Whether the sum of Rs. 1,00,000 was paid as a consideration for the transfer of capital asset or as a compensation for loss of future profits ".

But for the strenuous arguments of Mr. Subbaraya Ayyar, the learned counsel for the assessee, we should have thought the narration of facts should have itself sufficed to answer both the questions against the assessee. The learned counsel for the assessee contended (1) that the right of a partner in a partnership which had a managing agency was not a capital asset as defined by section 2(4-A) of the Act, and (2) even if it was a capital asset, the requirements of section 12-B of the Act were not satisfied in this case, because there was no sale, exchange or transfer.

What section 12-B subjects to tax is the profits and gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March, 1946 and before the 1st day of April, 1948. It was common ground that none of the provisos to section 12-B applied to the claim of the assessee. Section 2(4-A) runs :—

> " Capital asset means property of any kind held by an assessee, whether or not connected with his business, profession or vocation, but does not include—
>
> (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business, profession or vocation :

(ii) personal effects, that is to say, movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him;

(iii) any land from which the income derived is agricultural income".

It is true that property has not been further defined by the Income-Tax Act. Nonetheless we are unable to accept the contention of the learned counsel for the assessee that his share in a partnership concern is not property within the meaning of section 2(4-A) of the Act.

In *J. K. Trust, Bombay* v. *Commissioner of Income-Tax and E.P.T.*[1] the learned Judges referred to the decision of the Privy Council in *Commissioner of Income-tax* v. *Currimbhoy and Sons*[2], and observed:

> " . . . . . in that case the Privy Council was considering the meaning to be given to the expression "property". They were construing the word "property" as used in section 42 (1) of the Act and the opinion their Lordships gave was that the word "property" as it occurs in sub-section (1) of section 42 could not be given so special a colour but was used as an ordinary English word to be taken in its usual signification subject to the context provided by the rest of the sub-section. . .
>
> The Privy Council has emphasised the fact that there is no definition given of the expression "property" in the Act, and property must be construed in its plain natural meaning subject to the context in which that expression occurs."

The learned Judges went on to hold that in the case before them it was not necessary to decide the questions, whether the commission earned by the Managing Agents was as a result of the contract whether that commission constituted a benefit under the contract and the benefit under the contract would be property within the meaning of section 4 (3) (1). We are concerned in this case with the question, whether the assessees' shares in the partnership concerns constituted property within the meaning of section 2(4-A) of the Act. Except for what has been excluded by section 2(4-A) itself, the term, property, has to be given its ordinary meaning in the English language. It would be impossible to hold that a share in a partnership is not property.

In *Guruswami Naidu* v. *Commissioner of Income-tax*[3], the learned Judges observed:

> "The assessee purchased for his exclusive benefit the interest of Palaniappa Chettiar, one of the partners who owned a five anna interest in the partnership. For acquiring that asset which was a profit-yielding one he had to expend this amount. It is in the nature of capital expenditure for acquiring a profit-yielding asset".

We respectfully agree with the view of the learned Judges, that a share in a partnership is a profit-yielding asset. That would certainly make it property within the meaning of section 2(4-A).

In *A. R. Rangachari* v. *Commissioner of Income-tax*[4], we had occasion to point out at page 541 of the report the difference between a share in the partnership as an asset, and a mere right to receive a share in the profits without an assignment of the share itself.

In *T. Sadasivam* v. *Commissioner of Income-Tax*[5], we quoted with approval the observation of Lord Macmillan in *Van Den Bergh's Case*[6].

> "In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered was a capital asset."

Applying that dictum to the agreement between the assessee and his partners in the three firms we have mentioned above and also to the managing agency agreement between R.G.S. Naidu and Company and the Coimbatore Spinning and Weaving Company Limited, we should hold that the congeries of rights which the assessee enjoyed under the agreements and which for a price he conveyed to Gopal Naidu constituted a capital asset.

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1. (1953) 23 I.T.R. 143 at 150
2. (1935) 3 I.T.R. 395 : L.R. 63 I.A. 1 : 70 M.L.J. 247 (P.C.).
3. (1952) 21 I.T.R. 188: (1952) 2 M.L.J. 29.
4. (1955) 28 I.T.R. 528.
5. (1955) 28 I.T.R. 435 at 447 : (1955) 2 M.L.J. 526.
6. (1935) 19 T.C. 390 (H.L.).

In *Commissioner of Income-Tax, Bombay City* v. *Asiatic Textile Company, Ltd., Bombay*[1], the learned Judges had no difficulty in holding that the rights under a managing agency agreement constituted a capital asset. Only in that case which was one of surrender, the learned Judges came to the conclusion, that section 12-B did not apply as there was no sale, exchange or transfer of a capital asset within the scope of section 12-B.

In *Kishen Prasad Co., Ltd.* v. *Commissioner of Income-Tax*[2], which the Supreme Court pointed out at page 53

> " . . . . the managing agency of a mill . . . no doubt would have been an asset of an enduring nature and would have brought them profits . . . . . ."

The learned counsel for the assessee contended that what was payable under the managing agency agreement between R.G.S. Naidu and Company, of which the assessee was a partner, and the Coimbatore Spinning and Weaving Company Limited, was realy remuneration for services rendered by each of the partners, and that therefore the right to receive such remuneration would not be property within the meaning of section 2 (4-A). Clauses (16) and (19) of the managing agency agreement, which we have already set out, should suffice to repel this contention. It was a transferable right that R.G.S. Naidu and Company obtained under the managing agency agreement. Clause (19) specifically recognised the right of each partner of the partnership concern to transfer or assign his rights without in any way impairing the continuance of the managing agency agreement.

In *Lakshminarayan Ram Gopal* v. *Government of Hyderabad*[3], their Lordships of the Supreme Court pointed out at page 460 :

> " When a partnership firm comes into existence it can be predicated of it that it carries on a business, because partnership, according to section 4 of the Indian Partnership Act, is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

Therefore, where a partnership acquires a right of managing agency, it carries on business, and the right of managing agency itself is one of the assets of that business. At page 458 their Lordships pointed out that in the case before them the appellants were the agents of the company and not merely servants of the company remunerated by wages or salary. As we said the terms of the managing agency agreement should themselves suffice to repel the contention of the learned counsel for the assessee, that what was payable to the managing agents was salary and that the relationship between the company and the partnership firm was that of master and servant. The learned counsel for the assessee referred to *E. D. Sassoon and Co., Ltd.* v. *Commissioner of Income-tax*[4], but we are unable to find anything in that case to help the contention of the assessee, that what was payable under the terms of the managing agency agreement in the case of the assessee's partnership was salary, and that the relationship between the company and the managing agent was that of master and servant.

Summing up what we have stated earlier, we hold that the share which the assessee had in each of the three partnership concerns was a capital asset within the meaning of section 2(4-A) of the Act.

The next question is was there a sale, exchange or transfer of the assessee's capital assets. As we pointed out earlier, no document evidencing the transaction between the assessee and Gopal Naidu was placed before us. But the accuracy of the statement in paragraph 2 of the Statement of the case submitted by the Tribunal was never in dispute. It was a condition of the transfer of the share of the assessee in R.G.S. Naidu and Co., to Gopal Naidu that Gopal Naidu transferred to the assessee the share held by Gopal Naidu in the other two partnership concerns to the assessee and paid in addition a sum of Rs. 1,00,000. There were all the elements of a sale in the transaction, which involved both exchange and transfer of capital assets.

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1. (1955) 27 I.T.R. 315.
2. (1955) 27 I.T.R. 49 at 53 (S.C.).
3. (1954) 25 I.T.R. 449 : (1954) S.C.J. 595: (1955) 1 S.C.R. 393.
4. (1954) 26 I.T.R. 27:(1954) S.C.J. 771: (1955) 1 S.C.R. 313.

The second of the questions referred to this Court was whether this sum of Rs. 1,00,000 represented the consideration for the transfer of a capital asset or was compensation for loss of future profits. The managing agency agreement between R.G.S. Gopal Naidu and Company and Coimbatore Spinning and Weaving Company Limited was left unimpaired by the transfer effected by the assessee in favour of Gopal Naidu of the transferree's share in the partnership concern, R.G.S. Naidu and Company. No doubt, thereafter the assessee was not entitled to claim any share in the profits earned by R.G.S. Naidu and Company, but it could hardly be said that the transaction between the assessee and Gopal Naidu should be viewed as compensation for loss of future profits which R.G.S. Naidu and Company could hope to earn.

Our answer to the second question is that the sum of Rs. 1,00,000 was paid by Gopal Naidu as consideration in part for the transfer of a capital asset. In addition, as we pointed out above, Gopal Naidu transferred his share in the other two partnership concerns to the assessee.

Our answer to the first question is in the affirmative and against the assessee.

As the assessee has failed, he will pay the cost of this reference. Counsel's fee Rs. 250.

V.S. *Answer accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

N. C. Kuppuswami Ayyangar .. *Petitioner**

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (*a*) (1)—*Premises let as residential house—Non-residential user—Effect.*

Where a premises has been let as a residential house it cannot be used for non-residential purpose without a specific agreement with the landlord or without his affirmative consent.

Acceptance of the rent by the landlord after knowledge of user by the tenant will not convert a dwelling house into a non-residential premises.

The mere fact that residential premises are also used for carrying on business in a part will not convert it into a non-residential building.

Whether a building is residential or non-residential is a question of fact and has to be determined according to principles laid down by Courts.

Petition under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, praying the High Court to revise the order of the District Court of Coimbatore dated 1st October, 1956 and made in Civil Revision Petition No. 80 of 1956 (C.M.A. No. 2 of 1955 Sub-Court, Coimbatore preferred against B.R.C. No. 113 of 1954 Rent Controller, Erode).

Messrs. Row and *Reddy*, for Petitioner.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition sought to be filed against the revisory order of the learned District Judge of Coimbatore in Civil Revision Petition No. 80 of 1956, under section 12-B of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949), which empowers the High Court to call for and examine the records relating to any order passed or proceeding taken under the said Act for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding. This is a revision of a revision.

The facts are :—Sivakamu Ammal is the owner of a dwelling house in Erode town. This Sivakamu Ammal let out his house to a doctor by name N. C. Kuppuswami Ayyangar. From 1953 this Sivakamu Ammal who is found to require this house *bona fide* for her own occupation has been requesting the tenant to vacate the house. The tenant has been putting off with evasive promises to do so. In the money order coupon Exhibit P-5 dated 12th October, 1953, the tenant writes :

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* C.R.P. No. 1569 of 1956. 12th December, 1956.

> "I am extremely sorry I cannot vacate the house now. I shall, do so as soon as I get a building".

In Exhibit P-6 letter dated 23rd June, 1953, he writes :

> "As suggested in your letter I am unable to vacate the house". In his letter, dated 30th July, 1953, the tenant has written "Regarding vacating the house I shall do it at an early date".

This Sivakamu Ammal applied to the Rent Controller for eviction on four grounds *viz.*, (*a*) that there has been wilful default in the payment of rent ; (*b*) that the tenant had damaged the house ; (*c*) that the owner wanted the house for her own occupation and (*d*) that the tenant who took the house on rent as a dwelling house is using it also as a business premises for carrying on a dispensary there.

The Rent Controller found that the tenant has been irregular in his payment of rent and in fact in his letter Exhibit P-7 dated 14th December, 1953, the tenant has stated "I am a defaulter for the last month ...." but that this defalt was not wilful and that after the petition was filed the tenant has been depositing the rent regularly and there was no arrear at the time of the enquiry. In regard to point (*b*) he held that the tenant was keeping the house in a dirty condition but had not caused any wilful damage. In regard to ground (*c*) he came to the conclusion that the landlady required *bona fide* the house for her own occupation and that she was entitled to the relief asked for as she was not occupying any other residential building of her own in that city, and fulfilling all the considerations determining reasonable and *bona fide* requirements of the landlord. For an exhaustive discussion of this topic *see* Chapter XVI, page 250 and following of Andhyarjuna's Principles of Rent Control (Bombay New Book Company).. In regard to ground (*d*) he came to the conclusion that though on inspection he found the building to be suitable more for dwelling purposes than for non-residential purposes, the test for deciding whether a premises is a house is its suitability as a place of residence (Vide *Malhar Rao* v. *Vinayak*[1] and though it was situated in the heart of residential quarters in Erode town, it had not been proved before him that it was leased for residential purposes alone but that this would not prevent the owner from applying for eviction, following the Full Bench decision in *Dakshinamoorthy* v. *Thulia Bai*[2], where it was held that if the letting was equally for residential and non-residential purposes and not mainly for the one or the other kind of purpose, the application of the landlord will stand whether filed under section 7 (3) (*a*) (i) or section 7 (3) (*a*) (ii) of the Act. The Rent Controller therefore ordered eviction.

The tenant has taken the matter both by way of appeal to the learned Subordinate Judge, Coimbatore, in C.M.A. No. 2 of 1955 and in Revision to the learned District Judge of Coimbatore, in Civil Revision Petition No. 80 of 1956. Both of them unhesitatingly confirmed the order of the Rent Controller.

The point that has been urged in all these Courts is that this house was let out as business premises and that it was being used only as a business premises. This is not supported by the evidence on record. First of all, the tenancy does not expressly provide for use of this house for the particular purpose of carrying on only a dispensary. When the dwelling place is not found to be let on one basis it cannot assumed without evidence of a new contract or a variation of the existing contract or without its being made out by the circumstance of the letting : Specific agreement with the landlord should be shown : *William* v. *Perry*[3], *Oker* v. *Perraton*[4], *Vyman* v. *Steward*[5]. If the change had been agreed to by the landlord the status of the house will be determined as at the time of the expiry of the notice to quit :

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1. 5 D.L.R. M.B. 45.
2. (1952) 1 M.L.J. 390.
3. L.R. (1924) 1 K.B. 936.
4. (1947) 2 All E.R. 286.
5. L.R. (1925) 2 K.B. 702.

Shooter v. *Gaitley*[1], *Court* v. *Robinson*[2], *Hasell* v. *Maldermi*[3]. *See* discussion in Lloyd and Montgomerie Rent Control, Second Edition, pages 10-11. There must be landlord's affirmative consent to the change *Wolfe* v. *Hogan*[4].

Secondly, acceptance of the rent by the landlord after knowledge of user by the tenant will not convert a dwelling house into a non-residential premises.

Thirdly, the premises will not be treated as non-residential building if they are substantially unsuitable for use as business premises, which is found to be the case here : *Challanghan* v. *Bristowe*[5] : *see* discussion in Lloyd and Montgomerie Rent Control, Second Edition, page 8.

Fourthly, the mere fact that residential premises are also used for carrying on business in a part will not convert it into a non-residential building. It has been held, for example, that appalam industry carried on in a room will not make the building non-residetial *Lakshman* v. *Balakrishna*[6], *Krishna Nair* v. *Valliammal*[7], *Broder* v. *Signat*[8], *Curl* v. *Angelo*[9], *Wimbush* v. *Cibulia*[10], *Wright* v. *Howell*[11].

Fifthly, whether a building in resdential or non-residential is a question of fact having regard to certain considerations laid down by Courts in deciding the question : *Ramachandrudu* v. *Bekraj Gulabchnd Firm*[12] ; *Premjee Harjee* v. *Nathamal*[13] ; *see* discussions in R. Mathurbutham and R. Srinivasan's The Madras Buildings (Lease and Rent Control) Act, 1949, pages 38 and 42 ; In the matter of *The Calcutta Stock Exchange Association Ltd.*[14] ; *Lakshman* v. *Balkrishna*[15], *See* Das Gupta Rent Control Acts and Orders in India and Pakistan, page 103 : *Wright* v. *Holwell*[16], *Railway Assessment* v. *Great Western Railway*[17], *Macmillan & Co.* v. *Rees*[18], *Vickery* v. *Martin*[19] *Kicks* v. *Snooks*[20], *Cohen* v. *Benjamin*[21], *Whitly* v. *Wilson*[22], (For a useful collection of English cases on business premises and dwelling house corresponding to our non-residential and residential buildings consult Blundells Rent Restriction Cases (1948) Second Edition and cumulative supplements). In this case the Rent Controller who inspected the premises, the Appellate Court who heard the appeal and the Revisional Court which looked into the matter to see whether there was any ground to interfere on a point of law, have all come to the conclusion that the premises do not constitute a non-residential building taken out of the scope of the application of section 7 (3) (*a*) (1) of the Act. I am bound by this finding of fact.

The next result of this analysis is that there are no grounds to interfere under section 12-B of the Act and this Civil Revision Petition is dismissed.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAGESA AYYAR.

Syed Mohideen Saheb .. *Appellant**.

Mahomedan Law—Gift of entire interest of donor which happened to be his undivided share in the property—Validity—Suit for declaration of ownership and possession of the share—Amendment introducing specific prayer for partition by metes and bounds—Decree for partition—Whether can be passed.

The donor whose interest was a share in a property made a gift of his entire interest to the plaintiff. It will not be possible for the donor to voluntarily effect a division and then deliver his share to the plaintiff. In a suit by the donee against the person entitled to the remaining share and the donor for a declaration of ownership and possession of the same.

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[1] (1936) 80 S.J. 74 (C.A.).

[2] L.R. (1951) 2 Q.B. 60 : (1951) 1 All E.R. 209.

[3] (1953) 2 All E.R. 58.

[4] (1948) 1 All E.R. 570.

[5] (1920) 89 L.J. K.B. 817.

[6] A.I.R. 1925 Bom. 398.

[7] A.I.R. 1949 M. 785 : (1949) 1 M.L.J. 74.

[8] L.R. (1949) E.Q.D. 112 (C.A.)

[9] (1948) 2 All E.R. 189.

[10] (1949) 2 All E.R. 432.

[11] 204 L.T.J. 299 (C.A.): (1948) 92 S.J. 26.

[12] (1952) 1 M.L.J. 399.

[13] (1954) 1 M.L.J. 29 (N.R.C.).

[14] (1934) I.L.R. 62 Cal. 547.

[15] A.I.R. 1925 Bom. 398.

[16] (1947) S.J. 26.

[17] L.R. (1948) A.C. 299.

[18] (1946) 1 All E.R. 675.

[19] L.R. (1944) K.B. 679 : (1944) 2 All E.R. 167.

[20] (1928) 93 J.P. 55.

[21] (1922) 39 T.L.R. 10.

[22] L.R. (1953) 1 Q.B. 679: (1952) 2 All E.R. 940.

*L.P. Appeal No. 83 of 1956. 21st November, 1956.

Held :—(i) The gift was valid, (ii) If the gift is otherwise valid, in a case like this, there can be no impediment to the Court directing a partition between the plaintiff in the right of his donor and the other sharer. Though the prayer was for declaration, it is in the interests of justice that the donee should be permitted to amend the plaint to introduce a specific prayer for partition by metes and bounds.

Appeal under clause 15 of the Letters Patent Against the judgment and decree in C.C.C.A. No. 83 of 1953, dated 19th January, 1956, on the file of the High Court (O.S. No. 1168 of 1950 City Civil Court, Madras.)

P. C. Parthasarathy Ayyangar, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—Two points were raised by Mr. Parthasarathy Ayyangar, learned counsel for the Appellant in this case. One is that the learned Judge, Basheer Ahmed Sayeed, J., erred in law in holding that the gift by the second defendant to the plaintiff of his share in the suit property was valid. The contention was that as the donee was entitled only to an undivided share, the gift was invalid because of the doctrine of *musha* under the Muhammadan Law. As the learned Judge observed, the prevailing view is that a gift of an undivided share which is capable of division is not void. Learned counsel for the appellant did not dispute this but argued that such a division could be made only by the donor himself and relied on the decision of the Lahore High Court in *Said Hassan* v. *Shah Hussain*[1]. That decision has obviously no application to the facts of the present case because there it was possible for the donor to have made a division himself and deliver the share which was the subject-matter of the gift. In the case before us the facts are entirely different. The donor has made a gift of his entire interest to the plaintiff. That interest was a share in a property It will not be possible for the second defendant to voluntarily effect a division and then deliver his share to the plaintiff.

In our opinion, if the gift is otherwise valid, in a case like this, there can be no impediment to the Court directing a partition between the donee in the right of the donor and the other sharer, the first defendant in this case. It certainly cannot be denied that the second defendant himself could have filed a suit for partition against the first defendant. No authority has been cited before us for the position that the Court could not pass a decree for partition at the instance of a donee, of an undivided share against the person entitled to the remaining share.

The next point raised was that the suit should not have been converted into a suit for partition. It is true that the plaint proceeded on the footing that there was separate enjoyment of the property in two equal halves by the second defendant and his deceased brother. The learned Judge was prepared to hold that there was a valid arrangement between the two sharers that the property should be enjoyed in two equal halves and that they also enjoyed the property thus. In these circumstances we think it is a highly techincal objection to say that the plaintiff cannot be given any relief in this suit where she has prayed for a declaration of ownership of the northern half of the plaint property and for possession of the same as against the first defendant. The learned Judge has made it clear that he has permitted an amendment of the plaint to introduce a specific prayer for partition by metes and bounds. We think that this direction is in the interests of justice on the facts of this case.

We see no reason to interfere with this direction. The appeal is dismissed.

K.S. *Appeal dismissed.*

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[1] A.I.R. 1947 Lah. 272.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Ramanadhan Chettiar .. *Appellant**

v.

The State of Madras represented by the Collector of Ramnad and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) and Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Grant whether was or was not of whole village—Burden of proof—Evidence not available—Case must be decided on onus of proof.

The onus would be on the party putting forward the case that the village is an 'estate'. When there is no evidence then the case must be decided on the onus of proof.

District Bord, Tanjore v. *Noor Mahomed,* (1952) 2 M.L.J. 586 (S.C.) and *Rama Rao* v. *Linga Reddy,* (1956) 2 An. W. R. 89, referred.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopalan, dated 7th September, 1955 and made in C.M.P. No. 4845 of 1951 presented to the High Court under Article 226 of the Constitution of India for issue of a writ of *certiorari* calling for the records in Revenue Appeal No. 10 of 1950 on the file of the Estates Abolition Tribunal, Maduari and to quash the order, dated 21st April, 1950 and made in the said appeal.

V. Vedantachari and *Alladi Kuppuswami,* for Appellant.

The Special Government Pleader (*V. V. Raghavan*), *V. Venkataraman* and *K. V. Sankaran,* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals are against the Judgment of Rajagopalan, J., disposing of two petitions under Article 226 of the Constitution of India, and raise the same point, namely, whether the grant to the appellant's predecessor was of a whole village. There was also another question whether the grant was of both the melwaram and kudiwaram. That question, however, is covered by a finding of fact that the grant consisted only of the melwaram. All the three members of the Estates Abolition Tribunal held that the grant was of a whole village. The Appellant sought in the above two petitions to have the Order of the Tribunal quashed and also to have the notification issued by the Government under the Rent Reduction Act in respect of the same village also quashed. Rajagopalan, J., held that it could not be said that there was no evidence before the Tribunal on which it could come to the conclusion that it came to, namely, that the grant was of a whole village, and that therefore there was no ground on which the order could be quashed.

Mr. V. Vedantachari, learned counsel for the appellant, contended that the order of the Tribunal was vitiated by an error apparent on its face, namely, that the Tribunal cast the onus on the land-holder, that is, the appellant, to prove that the grant was not of a whole village. He relied strongly on the recent decision of the Supreme Court in *District Board, Tanjore* v. *Noor Mohamed* [1].

The facts necessary to appreciate the contention of the appellant are briefly as follow. The original grant of the village in question is not available. The only evidence available is the extract from the Inam Fair Register relating to this village. That clearly shows that at the time of the inam settlement, there was an extent of 10 acres 52 cents in the village which constituted a separate Devadayam service grant. It is common ground that there is no evidence whatever to show when this grant was made and by whom. The question is whether at the time when the rest of the village was granted to the appellant's predecessor, the Devadayam grant had already been made. If that be so, then undoubtedly, under

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* Writ Appeal Nos. 112 and 113 of 1955. 11th July, 1956.

[1] (1952) 2 M.L.J. 586 (S.C.).

Explanation 1 to section 3 (2) (*d*) of the Estates Land Act, the village should be deemed to be an estate notwithstanding that it did not include the lands which had already been granted. It is equally clear that if there is evidence that the original grant was of the whole village; and that at a subsequent date the Devadayam minor inam was carved out of the whole village by the original grantee, then the village would be an "estate" within the meaning of the Estates Abolition Act and the Rent Reduction Act. But, as pointed out by the Supreme Court, there is also the other contingency of the original grantor reserving to himself this extent when he made the grant of the rest of the village to the appellant's predecessor, and then, simultaneously or at a subseqeuent date, granting the Devadayam inam. It may be said that this is not very probable. But the fact is that we have no evidence in the matter. In such a state of paucity of evidence, the case must be decided on the basis of the onus of proof. The Supreme Court has in the cleares terms laid down that the onus would be on the party putting forward the case that the village is an estate; that is to say, in this case, the onus would be on the Government and the tenants. Undoubtedly, neither the Government nor the tenants have adduced evidence to help them discharge the burden of proof which lay on them. The effect of the Supreme Court's decision is, if we may say so with great respect, lucidly explained by Satyanarayana Rao, J., in *Rama Rao* v. *Linga Reddi*[1]. This ruling has been followed in subsequent decisions of the Andhra High Court. Rajagopalan, J, does refer to the above decision of the Supreme Court, but has not discussed the effect of the ruling. The learned Judge says that the question whether in a given case there was evidence to show that Devadayam or service inam grant had been anterior to the grant of a named village must necessarily depend on the evidence available in that case. Undoubtedly so. But, where there is no evidence available,—admittedly as in this case—then, the case must be decided on the onus of proof. This has been overlooked by the learned Judge. We hold that the order of the Tribunal is liable to be quashed because of this fundamental error on its face. The appeal is allowed and the order of the Tribunal is hereby quashed. It follows that the notification of the Government under the Rent Reduction Act must also be quashed. The appeal in respect of that notification is also allowed.

There will be no order as to costs.

V.S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

Chinna Thirumalai Naidu .. *Petitioner**

v.

Challapathi Naidu .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1957)—Power of Revenue Divisional Officer to set aside ex parte *order.*

Ordinarily, in the absence of any specific provision in a Statute a Court or authority has no power to set aside *ex parte* orders by it. Hence a Revenue Divisional Officer acting under the Madras Cultivating Tenants Protection Act has no power to set aside *ex parte* orders passed by him and restore the application for being re-heard. Rule 8 of the rules framed under the Act specifically provides for the application of the Code of Civil Procedure only for certain purposes. It does not enpower the officer to set aside *ex parte* orders made by him.

Petition under section 6-B of Act XXV of 1955 and 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Revenue Divisional Officer, Trivellore, dated 6th October, 1956 and made in T.A.P. No. 24 of 1956.

M. C. Raghavachari, for Petitioner.

G. R. Jagadisan, for Respondent.

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[1] (1956) 2 An.W.R. 89.

* C.R.P. No. 1615 of 1956. 22nd January, 1957.

The Court delivered the following

JUDGMENT.—The short question raised in this revision is whether a Revenue Divisional Officer acting under Madras Act XXV of 1955 and who ordered a landlord's application against a tenant *ex parte* had the power to set aside the *ex parte* order and restore the application for being re-heard. The Revenue Divisional Officer before whom the application was made was of the view that he had no such power, and I agree that that view is right.

Rule 8 of the Madras Cultivating Tenants' Protection Rules, 1955, provides that the proceedings of the Revenue Divisional Officer shall be summary and shall be governed as far as possible by the provisions of the Civil Procedure Code having regard to (*a*) the issue of service of summons ; (*b*) the examination of parties and witnesses and (*c*) the production of documents. It is clear that under this rule the Revenue Divisional Officer was not empowered to set aside an *ex parte* order made by him. But the contention of Mr. Raghavachariar, the learned counsel for the petitioner was that apart from any such powers, the Revenue Divisional Officer functioning as a Court had inherent jurisdiction to set aside an *ex parte* order made by him. But he has not been able to cite any authority in support of his contention that a Court has got inherent jurisdiction to set aside an *ex parte* order passed by it. Ordinarily when once a matter is disposed of, finality attaches to the order and unless a Court is clothed with special powers to set aside that finality and restore the application, it must be held that the Court has no inherent jurisdiction.

In similar circumstances, two learned Judges of this Court have expressed the same view, Balakrishna Ayyar, J., in W.P. No. 560 of 1954 and Rajagopala Ayyangar, J., in W.P. No. 520 of 1954. I respectfully agree with those learned Judges and hold that the Revenue Divisional Officer had no jurisdiction to set aside the *ex parte* order and restore the application. The revision is therefore dismissed with costs.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The State of Madras, represented by the Commissioner, Hindu Religious and Charitable Endowments, Madras and others.. *Petitioners**

v.

Thiruvadaimarudur Sri Mahalingaswami Devasthanam, Hereditary Trustee represented by Sri Sri Subramania Pandarasannadhi Avl. .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 103 (*e*) (*ii*)—*Scheme framed by a Civil Court—Provision for approval of budget by the Court—Coming into force of the Madras Act (XIX of* 1951)—*Effect—Power of the Commissioner.*

All the powers and duties exercisable by a Court under the provisions of a scheme framed by the Court as regards the administration of a Religious Endowment devolved upon the Commissioner for Hindu Religious and Charitable Endowments after the coming into force of the Madras Act (XIX of 1951). The power to call for a budget, though vested in the Court under a scheme, vests in the Commissioner after the commencement of the Act and the Civil Court has no jurisdiction to call for or approve a budget. After the coming into force of the Act the trustee should submit the budget only to the Commissioner and not to the Court.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Subordinate Judge of Kumbakonam, dated 8th December, 1953 and 12th January, 1954 and made in O.S. No. 8 of 1918.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Government Pleader (*C. A. Vaidialingam*), for Petitioner.

K. Rajah Ayyar, K. Raghavachariar and *V. Seshadri,* for Respondent.

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* C.R.P. Nos. 675 and 676 of 1954. 4th February, 1957.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two Revision Petitions raise a point practically covered by our decision in Civil Revision Petition No. 1162 of 1953 where we held that all powers and duties exercisable by a Court under the provisions of a scheme devolved on the Commissioner for Hindu Religious and Charitable Endowments, Madras, after the passing of the Hindu Religious and Charitable Endowments Act, 1951.

The question in these two cases relates to clauses 12 and 13 in the scheme framed by the learned Subordinate Judge of Kumbakonam in O.S. No. 8 of 1918 for the temple of Sri Mahalingaswami at Thiruvadamaruthur. These two clauses run thus :

> *Clause* 12.—" The trustees shall within two months prior to commencement of the year prepare and file in Court a budget of the estimated receipts and expenditure including the proposals to discharge debts if any due by the temple for the coming year under various heads.
>
> *Clause* 13.—The Court may on the application of not less than 5 worshippers made within three weeks of the said filing after notice to the trustees alter or amend the budget so filed and the trustee shall conform to the budget with the alteration if any made by the Court."

The Commissioner for Hindu Religious and Charitable Endowments directed the Deputy Commissioner to bring to the notice of the Sub-Court, Kumbakonam, the fact that after the coming into force of the Madras Hindu Religious and Charitable Endowments Act, 1951, the Deputy Commissioner was competent to pass the budget in view of section 103 (*e*) (ii) of the Act. The learned Government Pleader, who represented the Commissioner, submitted that if a budget had been submitted by the trustee to the Court, he, the trustee, may be intimated that the appropriate authority to scrutinise was the Deputy Commissioner, Tiruchirapalli, and not the Court. The learned Judge passed the following order after referring to the communication from the Deputy Commissioner :

> " Direct the hereditary trustee to submit the Budget without any delay to this Court as required by the scheme "

and subsequently he passed the following order after the budget for the year 1954 had been filed by the trustee :

> " The Budget is approved in view of the explanatory memo. filed by the Pandara Sannadhi."

The Commissioner for Hindu Religious and Charitable Endowments, Madras, seeks revision of these two orders of the learned Subordinate Judge on the ground that after the coming into force of the Act of 1951 the submission of the budget should be to the Commissioner concerned, and not to the Court as provided in the original scheme. We agree with the contention of the learned Advocate-General on behalf of the Commissioner, that the power to call for a budget vests in the Commissioner after the passing of the Act of 1951 and it is no longer open to the Court to take any action either under clause 12 or under clause 13 of the scheme. Wherever the expression " Court " occurs, it should be substituted by the word " Commissioner for Hindu Religious and Charitable Endowments ".

The learned Advocate-General also drew our attention to section 70 of the Act of 1951. That section makes it incumbent upon the trustee of every religious institution to sumit a budget every year to the Area Committee in certain cases and to the Commissioner in other cases. Though an attempt was made to attack the validity of this section, the Supreme Court was apparently inclined to hold that the section was quite valid. In *The Commissioner, Hindu Religious and Charitable Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1], Mukherjea, J., who delivered the judgment of the Court, observed :

> " Section 70 relates to the budget of religious institutions. Objection has been taken only to clause (3) which empowers the Commissioner and the Area Committee to make any additions to or alterations in the budget as they deem fit. A budget is indispensable in all public institutions and we do not think that it is *per se* unreasonable to provide for the budget of a religious institution being

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[1] (1954) S.C.J. 335 : (1954) 1 M.L.J. 596: 1954 S.C.R. 1005 at 1037 (S.C.).

prepared under the supervision of the Commissioner or the Area Committee It is to be noted that if the order is made by an Area Committee under clause (3), clause (4) provides an appeal against it to the Deputy Commissioner."

It is obviously not desirable nor convenient that the trustees should be called upon to submit budgets both to the Court and to the Commissioner with the possibility of having to obey two contradictory directions by the Commissioner and the Court. This could not have been contemplated by the new Act.

Mr. Raja Ayyar, learned counsel for the respondent-trustees, contended that the jurisdiction of the civil Court has not been ousted, and in support of his contention, he relied upon certain observations in *Advocate-General, Madras* v. *Kuppuswami Gurukkal*[1]. We are unable to see how these observations help the respondents in any way. Actually in that case the learned Judges were concerned with the scope of section 75-A which had been added to the Act of 1927 by an Amending Act of 1946. The present section 103 (*e*) (ii) of the Act of 1951 is significantly different from the old section 75-A in several particulars. The learned Chief Justice construed the expression "administration" occurring in section 75-A of the old Act as being confined to the actual management, superintendence of the subject-matter of the scheme and the execution of all acts arising and required to be performed in such management and superintendence and held that the appointment of a trustee was not an act of administration of a trust to which he is appointed nor is it an exercise of a power of administration. In dealing with the provision contained in section 75-A of the Act of 1927 the learned Chief Justice said :

> " . . . . The ouster of jurisdiction of the Court must be clearly and unambiguously expressed when such is the intention of the Legislature. In considering whether the section in question does effect ouster, reference can conveniently be made to some other sections of the Act. Section 57 (1) empowers the Board, in the circumstances therein specified, by order to settle a scheme of administration of a temple. But by sub-section (7) the trustee or any person having interest may within six months of the date of publication of the order institute a suit to modify or set it aside. By sub-section (9) any scheme of administration settled by a Court under section 57 may be modified or cancelled by the Court. Clearly, in any action taken by the Board under section 57, the Court itself is the ultimate authority to decide finally all matters with respect to the subject-matter of the scheme framed by the Board. By sub-section (2) of section 57, the scheme settled by the Board may contain provisions for (*a*) fixing the number of trustees, (*b*) removing trustees and (*c*) appointing new trustees. Clearly there the Board is authorised to name some authority other than itself to appoint trustees. The sub-section does not indicate that the Board itself must be the authority to appoint trustees."

We are unable to see how these observations materially help the respondent's case. The decision in the above-mentioned case rested entirely on the opinion that the appointment of a trustee was not in exercise of the power of administration, and section 75-A only referred to powers of administration.

We therefore are clearly of the opinion that after the coming into force of the Act of 1951, the budget will have to be submitted only to the Commissioner in this case and not to the Court. But we see no reason why we should set aside the actual order made by the Subordinate Judge approving the budget for the year 1954 which had been filed as per his directions. The Civil Revision Petitions are dismissed with these observations, but there will be no order as to costs.

R.M. *Petitions dismissed.*

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1. (1947) 2 M.L.J. 198 at 200.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMASWAMI GOUNDER.

V. D. Yesudasan and others .. *Petitioners**

v.

Guruswamy .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 132—*Scope of—Protection under of police officers while acting under Chapter IX of the Code—Onus of proof.*

The protection conferred by section 132 of the Code of Criminal Procedure will be rendered nugatory if the onus is to be thrown on the police officers to prove in a trial that they acted under the provisions of Chapter IX of the Code, before they could seek the protection of prior sanction of the State Government. If the police officers are able to prove that they were acting in discharge of their duties as public officers in dispersing an unlawful assembly, then they are not guilty of any offence. But this could be gone into only at the trial. But the object of section 132 of the Code is to afford protection to public servants acting in discharge of their duties, from being unnecessarily prosecuted without reasonable cause which is ensured by the insistence of prior sanction of the State Government. The allegations in the sworn statement of the complainant that the concerned police officer acted in excess of his powers cannot by itself take away the protection afforded by the section.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate of Koilpatti, dated 11th July, 1956, and made in Crl.M.P. No. 87 of 1956 in C.C. No. 96 of 1956.

A. S. Sivakaminathan, for *V. T. Rangaswami Aiyangar* and *R. Santhanam*, for Petitioners.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondent.

The Order of the Court was made by

Somasundaram, J.—Petitioners 1 to 3 in Crl. M.P. No. 87 of 1956 (Accused 5 to 7 in C.C. No. 96 of 1956) on the file of the Sub-Divisional Magistrate, Koilpatti, are the petitioners herein. The fifth accused is a Sub-Inspector of Police and accused 6 and 7 are police constables. The complainant belongs to the village of Athikinar hamlet of Shanmugapuram in the Tirunelveli District. After the Estate Abolition Act, there was trouble between the ryots in the village of Athikinar and the proprietor the Zamindar of Ettiyapuram. Orders under section 144 of the Code of Criminal Procedure were passed against the complainant and the other residents of the village of Athikinar restraining them from interfering with the cultivation of certain lands belonging to the Zamindar. That there was a dispute between the ryots and the inhabitants of the above village and the Zamindar who is impleaded as the first accused in the above case is clear from the allegations contained in the complaint filed by the complainant. The matter was taken to the Civil Court also and the complainant and the other men were restrained by an injunction from interfering with the possession of the lands belonging to the Zamindar or his lessees.

On 21st April, 1956, the fifth accused, the first petitioner herein, accompanied by two other constables, along with six or seven reserve constables and three or four police constables undoubtedly visited the village of Athikinar coming in a police lorry and a jeep. According to the allegations in the complaint they got down a furlong away from the village, rounded up the womenfolk who were engaged in plucking cotton and took them to the village and presented them before the Circle Inspector. Most of the menfolk ran away on seeing this. The complainant also took shelter in the house of one Valliammal. After getting information that the police and others were trying to break open the door of his house, the complainant alleges, he rushed to his house and then he was beaten by accused 2 to 7 by sticks. He was beaten in the buttocks and on his leg and then he fell down unable to bear the pain and became unconscious and when he recovered consciousness, he alleges, he found himself kept under a margosa tree in the outskirts of the village. It is for causing these injuries to the complainant he has filed this complaint in the above case implicating accused 5 to 7, the Sub-Inspector and two other constables as accused in the case, along with the Zamindar and his clerk, agent and others.

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* Cr.R.C. No. 724 of 1956. 14th February, 1957.
(Cr.R.P. No. 678 of 1956).

In the sworn statement taken from the complainant this is what he stated :

> " The Reserve Police, the Sub-Inspector and Zamindar's men got down from these vehicles. They gathered together about 50 women who were picking cotton in that area and led them towards the village. On seeing that our menfolk got frightened and ran away, I also went and hid myself in Valliammal's house in the south street of my village."

The police filed a charge-sheet in C.C. No. 136 of 1956 against eleven persons for offences under sections 143, 144 and 225-B of the Indian Penal Code. This also is said to have taken place on the same day and at about the same time as the occurrence in respect of which the complainant has filed a complaint against these petitioners and others. The complainant in this case is the fourth accused in the case filed by the police in C.C. No. 136 of 1956.

The petitioners raised a preliminary objection before the Sub-Divisional Magistrate that section 132 of the Code of Criminal Procedure is a bar to the prosecution against them and the complaint, therefore, ought not to be entertained without the sanction of the State Government. The Sub-Divisional Magistrate before whom both the cases had been filed dismissed the petition holding that what is alleged in the complaint filed by the private complainant is entirely in respect of a different action and at a different place and that at that stage the Magistrate was not inclined to hold that the complainant sustained the injuries in the cotton punja as alleged on behalf of the petitioners. He therefore dismissed the petition. It is against this order that the present revision has been filed. The question is whether in the circumstances mentioned in the complaint, section 132, Criminal Procedure Code can be invoked to the aid of the petitioners herein as a bar to the prosecution filed against them by the private complainant.

On behalf of the petitioners reliance is placed on the decision of Burn, J., in *Schamnad* v. *Rama Rao*[1]. The contention of the petitioners is that they were acting under sections 127 and 128 of the Code of Criminal Procedure, that is to say, they were dispersing an unlawful assembly and they had to use a mild force as there was resistance by the members of the unlawful assembly and that they were therefore only acting in the discharge of their duties and they are entitled to the protection afforded by law under section 132 of the Code of Criminal Procedure. The fact that if the petitioners herein did act in the discharge of their duties, *viz.*, in dispersing an unlawful assembly, then section 132, Criminal Procedure Code, is applicable, is not, and cannot be, disputed. The whole question, therefore, turns upon the question whether the occurrence took place as alleged by the complainant, that is to say, whether he sustained the injuries in the manner alleged by him or whether he sustained the injuries when the police used force in dispersing an unlawful assembly. It is the contention of the complainant that till it is proved that there was an unlawful assembly and that the petitioners acted under sections 127 and 128 of the Code of Criminal Procedure the question of sanction does not arise. In short, the onus is thrown on the petitioners to prove that they were acting in the discharge of their duties in dispersing an unlawful assembly. If they prove that, then certainly they are not guilty at all of any offence under section 79 of the Indian Penal Code. That is established only after the trial is gone through or the petitioners undergo the necessary trial. But what is contemplated under section 132, Criminal Procedure Code, is that they could not even be put on trial. The section says :

> " No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any criminal Court, except with the sanction of the State Government."

The protection conferred by this section will be rendered nugatory if the onus is to be thrown on the petitioners to prove in the trial that they acted under this chapter, that is, under Chapter IX of the Code of Criminal Procedure. To find out whether the accused acted under this chapter or not, it is contended for the complainant that only the complaint and the sworn statement should be looked into and not any other circumstances or document. Burn, J., while dealing with this point has disagreed with that view. He points out that if such a contention is sound

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[1] (1932) M.W.N. (Cr.) 253.

> " it would follow that any one, by appropriate assertions in his complaint and sworn statement, could deprive police officers of the protection which the legislature has given them under section 132, Criminal Procedure Code ".

There is considerable force in the observations made by Burn, J., as even in cases where admittedly the police officers acted under Chapter IX of the Code of Criminal Procedure by appropriate allegations in the complaint, the sanction required under section 132, Criminal Procedure Code, may be evaded and the Court would be asked to proceed with the case against the accused. This could not have been the object of the legislature when it provided safeguards for the protection of public servants while they were acting in the discharge of their duties.

The decision of Burn, J., has been followed by King, J., in *Elaya Pillai* v. *Arulanandam Pillai*[1]. In fact both these decisions follow an earlier decision of a Bench of this Court in *Gangaraju* v. *Venki*[2], and adopts the observations of Waller, J., in *Gangaraju* v. *Venki*[2], where the learned Judges were dealing with section 197 of the Code of Criminal Procedure. Waller, J., in the above case has observed as follows :

> " It (referring to section 197, Criminal Procedure Code) is framed in very wide terms. It requires that Judges, Magistrates and certain public servants shall not be prosecuted without the sanction of the competent authority for any offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. The object obviously is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them, while they were acting or purporting to act as public servants. The policy of the legislature is, we conceive, to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted, to confer on the local Government, if they choose to exercise it, complete control of the prosecution. We can see nothing in these precautions to which the public at large can legitimately take exception, and consider that the sub-section should be construed as widely as it has been framed."

After quoting the above observations of Waller, J., Burn, J., observes:

> " In my opinion, every word of this passage is equally applicable to section 132, Criminal Procedure Code, the terms of which are as wide as if not wider than those of section 197 ".

The decisions of Burn, J., and King, J., have been subsequently followed by Govinda Menon and Basheer Ahmed Sayeed, JJ., in Criminal Revision Case No. 286 of 1953 ; and they were further followed by Panchapakesa Ayyar, J., in Criminal Revision Case No. 461 of 1954. In the last case, Panchapakesa Ayyar, J., clearly points out that if any police officer has really misbehaved and used force far in excess, it is open to the complainant to place the facts before the Government and obtain the sanction. The learned Judge points out how if a police officer really misbehaves, Government is not likley to support his action and they will consider in terms of giving sanction to the complainant to prosecute him if they are really satisfied that such excess has been committed by the particular police officer, to prosecute whom sanction is asked for. There is really no difficulty to prosecute any police officer if he really misbehaves.

Apart from all these nice considerations, the allegations in the complaint itself suggest that the police officers had come there in discharge of their duties to disperse an unlawful assembly. The complainant refers to an earlier order under section 144, Criminal Procedure Code, passed against them and a subsequent injunction against them restraining them from picking cotton in the very field which is the subject-matter of dispute, how the womenfolk were rounded up and presented before the Inspector and how the menfolk started running and how the complainant also started running and took shelter. It is not as if the complainant was in his house and the police came and pulled him out and beat him. The allegations in the complaint read with what he has stated in his sworn statement really suggest that the police officers must have come there for the purpose of dispersing the members of the unlawful assembly, in fact, the version contained in the police charge-sheet in C.C. No. 136 of 1956 clearly supports this conclusion.

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[1] (1937) M.W.N. (Cr.) 259.

[2] (1929) 57 M.L.J. 31 : I.L.R. 52 Mad. 602.

On the facts of this case it is clearly established that the petitioners were acting under Chapter IX of the Code of Criminal Procedure, and therefore, they are entitled to protection under section 132 of the Code of Criminal Procedure. The proceedings against the petitioners are, therefore, quashed.

R.M. — *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Messrs. Mettur Industries, Limited, by Managing Agents Messrs. M. A. Beardshell and Company, Limited .. *Petitioner**

v.

The State of Madras represented by the Secretary to the Government of Madras, Revenue Department, Fort St. George, Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939) and Sales Tax Laws Validity Ordinance (III of 1956)—Scope and effect of—Extent of validation.

The Sales Tax Validity Ordinance, 1956 promulgated by the President on 30th January, 1956 validates both the imposition of sales tax and the collection of it. But in order to attract this validating provision there should be a State law imposing or authorising the imposition of such sales tax.

The scheme of taxation under the Madras General Sales Tax Act before the coming into force of the Constitution was that certain transactions though not actually taking place in the State which levied the tax were still taxed by virtue of the extended definition of sale under Explanation (2) to section 2 (*h*) of the Act. On the coming into force of the Constitution, the provisions of Article 286 of the Constitution came into force and imposed a ban on the levy of a sales tax by a State on certain transactions. This provision was incorporated in the Madras General Sales Tax Act as section 22 to bring it into conformity with the Constitution and this section has to be read as an explanation into the definition of 'sale' in the Act. So read it would exempt from tax all sales whose locus or situs was 'outside the State' this 'out side' sale being that as defined by the Explanation. Secondly a ban continued to be placed on the taxation of inter-State trade and commerce under section 22 (*b*) of the Act, so long as Parliament did not otherwise provide.

It is the levy of tax on a sale, which was held taxable under Article 286 (2) before the *Bengal Immunity Case*, (1955) S.C.J. 672 : (1955) 2 M.L.J. 168 : (1955) 6 S.T.C. 446 : (1955) 2 S.C.R. 603 (S.C.), that is validated by section 2 of the Ordinance III of 1956, notwithstanding its inter-State character.

The Ordinance by itself does not and cannot impose a tax liability and if there was no tax liability on sales covered by the Second Explanation to section 2 (*b*) of the Sales Tax Act, such levies are not validated by the Ordinance which validates only such taxes as were levied by an Act of the State Legislature.

Petition under section 12-B (1) of the Madras General Sales Tax Act (*see* rule 13-C (1) (*a*) praying the High Court to revise the Order of the Court of the Sales Tax Appellate Tribunal, dated 25th May, 1955 and made in T. A. No. 789 of 1954.

M. Subbaraya Aiyar, V. Sethuraman, S. Padmanabhan and *S. V. Subramanian* for Petitioner.

Advocate-General (*V. K. Tiruvenkatachari*) and the Assistant Government Pleader (*K. Veeraswami*) for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—Messrs. Mettur Industries, Ltd., are the petitioners in this Tax Revision Case. These proceedings arose out of the assessment for the year 1951-1952. The Deputy Commercial Tax Officer, ascertained the net assessable turnover of this assessee at Rs. 2,40,87,084-0-7. Objections were taken to this assessment by the assessee and an appeal was filed to the Commercial Tax Officer, but that appeal was dismissed. The objections were repeated in a further appeal by the assessee to the Tribunal.

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* Revision Petition No. 129 of 1955. 16th April, 1956.

The objections taken by the assessee fell under three heads: (1) a sum of Rs. 23,66,029 claimed to be the turnover arising from inter-state sales, the exemption claimed being under Article 286 (2) of the Constitution; (2) Rs. 19,41,362 being the turnover on the purchase value of cotton purchased by the mills from Messrs. Volkart Brothers; and (3) Rs. 2,24,517 being the sales-tax collections made by the appellant, to the inclusion of which in the assessable turnover objection was taken. The first item of the claim under the head of exemption by reason of the sales being of an inter-State character was allowed by the Tribunal, and is no longer in dispute before us. The third of the items, *viz.*, the inclusion in the turnover of the sales-tax collected by the assessee is now validated by Madras Act VII of 1954. This was disallowed by the Tribunal and because of the validating enactment, this was not contested before us. The only matter now in controversy relates to item (2) *viz.*, the turnover of Rs. 19,41,362 being the value of the cotton purchased during the year by the mills.

Section 3 (1) of the Madras General Sales Tax Act enacts—

> " Every dealer shall pay for each year a tax on his total turnover for such year ".

This is subject to the provisions of section 5, sub-section (*ii*) of which enacts:

> "As regards the sale of cotton, the tax is to be levided only at such single point in the series of sales by successive dealers as may be prescribed."

The relevant rule which prescribes and fixes this single point for taxation is rule 4 (2) (*b*) of the Turnover and Assessment rules, read with rule 4-A of the same rules. The net result of these is that in the case of cotton bought by a Spinning Mill, the tax is levied from the Spinning Mill (that is, it is at the purchase point that the tax is levied, and from the purchaser) on the amount for which it is bought by it, so that, on the terms of the provisions of the Sales Tax Act, the liability to tax is undoubted. The contention that was however advanced before the Tribunal may be summarised in its own words:

> "These are inter-State sales which, though liable to tax by reason of the Explanation to Article 286 (1) (*a*) on the ground that both delivery and consumption took place in this State, yet are liable to be excluded from taxation as the State of Madras have decided to levy tax on such transactions only from 1st April, 1953 ".

This point in the form in which it was raised before the Tribunal was not repeated before us, but the objection before us was rested on Article 286 of the Constitution, based on the interpretation of that Article by the Supreme Court in the *Bengal Immunity Case*[1].

In view of the decision it will not be possible to sustain the validity of this levy, but for the Sales Tax Laws Validity Ordinance III of 1956, which was promulgated by the President on 30th January, 1956. Its long title is:

> " An Ordinance, to validate laws of States imposing or authorising the imposition of taxes on the sale or purchase of goods in the course of inter-State trade or commerce."

The question to be considered in the present case is whether this Ordinance does or does not validate the levy of the tax. The operative part of the Ordinance is in these terms:

> " Notwithstanding any judgment, decree or order of any Court, no law of a State, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-state trade or commerce during the period between the 1st day of April, 1951, and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-state trade or commerce; and as such taxes levied or collected or purporting to have been levied or collected during the aforesaid period, shall, notwithstanding any defect in, or invalidity of the enactment under which the tax was levied or collected, be deemed always to have been validly levied or collected as if this Ordinance were in force on the date on which such tax was levied or collected."

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[1] (1955) 2 M.L.J. 168: 1955 S.C.J. 672: (1955) 6 S.T.C. 446: (1955) 2 S.C.R. 603 (S.C.).

It will be seen that section 2 is composed of two parts, the first one validating the law, and the later one validating the levy or collection. The scope, however, of the two limbs, is identical, and while the collection of the tax is validated by the second, the imposition itself is rendered valid by the first.

In view of the terms of this Ordinance, the question that has to be considered is :

> " Was there a law imposing or authorising the imposition of the tax now sought to be levied by the State, under the Madras General Sales Tax Act ?"

For, if there was, notwithstanding that such taxation and levy would have been in contravention of Article 286 (2), it is now rendered valid by the provisions of this Ordinance. We shall, therefore, have to examine the scope of the Sales Tax Law of this State, and ascertain, whether before 6th September, 1955, a tax was imposed on the purchase of the goods now in dispute, since the other terms of the Ordinance are satisfied, in that the purchase transaction of the assessee, on which he is taxed, took place between the 1st of April, 1951 and the 6th of September, 1955.

For determining this question, it is necessary to set out and examine the relevant portions of the State taxing enactment. The long title of the Madras General Sales Tax Act ran :

> " An act to provide for the levy of a general tax on the sale of goods in the State of Madras ".

and this was repeated in its preamble. The tax was laid on the 'turnover' of a dealer, *vide* section 3 (1), which is the main charging section, and 'dealer' was defined by section 2 (*b*) as a person who carries on the business of buying or selling goods. 'Turnover' was defined in section 2 (1) to mean the aggregate amount for which the goods were either bought or sold by a dealer, to refer only to the material part of the provision, and it was left to the rules to prescribe subject to specified conditions whether in respect of any goods the tax was to be levied on the buyer or the seller, [*vide* section 3 (5)]. The expression 'sale' also received statutory definition in section 2 (*h*) which ran :

> " 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes also transfer of property in goods involved in the execution of a work contract, but does not include a mortgage, hypothecation, charge or pledge ;
>
> *Explanation* (1).—A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.
>
> *Explanation* (2).—Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purpose of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made—
>
> (*a*) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or (*b*) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made."

The *Explanation* (2) to this definition was added as a result of an amendment effected to the original Sales Tax Act of 1939, by an amending Act of 1947. These were the provisions in force at the date of the Constitution, *i.e.*, on 26th January, 1950.

As the Sales Tax Act was enacted by a Provincial Legislature constituted under the Government of India Act of 1935, the ambit of its territorial extent was determined by sections 99 and 100 of the Government of India Act, 1935, under which a Provincial Legislature might make laws 'for the province', with respect to the matters enumerated in the Provincial Legislative List, to refer only to those now relevant. In the light of this territorial limitation, the transaction, which could be the subject of tax under this enactment, must obviously have been 'sales' which were effected within the territory or which had a real and substantial nexus with this State. The Sale of Goods Act, however, does not define the situs of a sale. So this had to be determined on the basis of other principles. As emphasis was laid on the main definition of 'sale' on the transfer of property in goods, it would have followed that the Sales Tax Act conceived, as a sale within the State of Madras, primarily a transaction in which the property in the goods passed within this State (see *Poppatlal Shah* v. *State of Madras*[1]).

This, however, was somewhat enlarged by *Explanation* (2) to section 2 (*h*) which introduced the criterion of the situs of the goods at the time of the sale as an additional factor, and introduced the fiction of the sale becoming completed here where such a factor was present even in cases where the property passed elsewhere. As there was a substantial nexus between this State and such transactions there was no constitutional impediment in the way of such a legislation. If the law were as laid down by the Sales Tax Act, up to this stage, without the complications introduced by the coming into force of the Constitution, the transactions of the assessee would amount to "a sale within the State", and would therefore be liable to tax.

Then came the Constitution, with its Article 286 reading:

> "(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—
>
> (*a*) outside the State; or
>
> (*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> *Explanation*.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.
>
> (2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:
>
> Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951".

We shall be reverting to the point of distinction between the exemption created under sub-clause (1) and that in sub-clause (2) of this Article a little later, after we set out certain other provisions which bear upon the questions we are now considering. In terms of the proviso to sub-section (2), the President issued the Sales Tax Continuance Order, 1950, on the day the Constitution came into force. It ran:

> "Any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution of India, shall until the 31st of March, 1951, continue to be levied, notwithstanding that the imposition of such tax is contrary to the provisions of clause (2) of Article 286 of the said Constitution".

The life of this order came to an end on the 1st of April, 1951. On the 2nd July, 1952, the President promulgated the Adaptation of Laws (Fourth Amendment) Order, 1952, by which a new section was introduced into the Madras General Sales Tax Act, numbered as section 22, which ran:

> "*Act not deemed to impose or authorise taxation in certain cases*.—Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place—
>
> (*a*) (i) outside the State of Madras, or
>
> (ii) in the course of the import of the goods into the territory of India or of the export of the goods out of such territory, or
>
> (*b*) except in so far as Parliament may by law otherwise provide, after the 31st day of March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.
>
> *Explanation*.—For the purposes of clause (*a*) (i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or

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[1] (1953) S.C.R. 677 : (1953) S.C.J. 369 : (1953) 1 M.L.J. (S.C.) 739. 4. S.T. Cases 188.

purchase for the purpose of consumption in that State notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

It will be seen that section 22 is, in effect, a verbal reproduction of Article 286 (1) and (2) of the Constitution of India, and was designed to ensure that the Madras General Sales Tax Act was in conformity with the Constitution. Section 22 would, therefore, have to be read as a rider to the charging sections of the Act. In other words, section 22 would have to be read as an explanation to the definition of sale which attracted tax liability under the Statute. So read, it would exempt from tax all sales, whose locus or situs was "outside the State", this "outside" sale being that as defined by the explanation. Secondly, a ban continued to be placed on the taxation of inter-State trade and commerce under section 22 (*b*), so long as Parliament did not otherwise provide.

If the provisions of section 22 were read in conjunction with 'sale' as defined by section 2 (*h*), along with *Explanation* (2) to that section, the position would be this : (1) where goods are outside the State at the time of the sale, and the transaction of sale was completed outside the State, the property having passed there, and delivery taken by the buyer there, and the goods are brought in as the goods of a purchaser, the transaction of sale would not be liable to tax under the Madras General Sales Tax Act (vide *Poppatlal Shah* v. *State of Madras*[1]). Where the transaction of sale related to goods which were inside the State at the time of the contract of sale, or the goods are produced in this State after an agreement of sale, and the sale is subsequently effected of such goods, *i.e.*, where the transaction is covered by *Explanation* (2) to section 2 (*h*), the tax liability in regard to that sale would depend upon whether or not the sale is effected "in the course of inter-State trade or commerce". If it is, there would be no liability to tax because of the exemption granted by Article 286 (2). But if the transaction of sale is completed here, by delivery to the buyer, and the transport across the boundary is not an integral part of the sale, the tax liability imposed by the extended definition in section 2 (*h*) would not be relieved by Article 286 (2), and so, not also by section 22 (*b*) of the Sales Tax Act.

The third class of cases would be, where the goods were originally outside the State, but are brought into the State by reason of the purchase, where the transportation into the State is an integral part of the sale. In this class of cases, whether the property in the goods passed within the State or not, the tax liability would be attracted by virtue of the main portion of the definition of 'sale' in section 2 (*h*) read with section 22. In regard to them, Article 286 (1) (*a*) and the *Explanation* thereto, which, by reason of their introduction into the Madras General Sales Tax Act as section 22 have to be read as part of the Sales Tax Act of this State, would fictionally deem such sales to be "inside" sales inasmuch as this is the State of delivery or consumption. The only objection to taxability could then be on the basis that there were elements of inter-State commerce involved in the transaction by reason of the goods coming over from outside.

We shall now turn to the decision of the Supreme Court on the construction of Article 286, which had led to the Ordinance we have set out above. In the *State of Bombay* v. *United Motors* (*India*) *Ltd*[2], the majority of the Judges of the Court interpreted the *Explanation* to clause (1) (*a*) as in effect, an explanation to Article 286 (2) as well. In the judgment of Chief Justice Patanjali Sastri, who spoke for the majority of the Court, the position was thus expounded.

> "We are, therefore, of opinion that Article 286 (1)(*a*) read with the *Explanation* prohibits taxation of sales or purchases involving inter-State elements by all the States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases which power it derives not by virtue of the *Explanation* but under Article 246 (3) read with Entry 54 of List II."

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[1] (1953) S.C.R. 677 : (1953) S.C.J. 369 : (1953) 1 M.L.J. 739 : 4 S.T.C. 188 (S.C.).

[2] (1953) S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. (S.C.) 743 : 4 S.T.C. 133.

Dealing next with the effect of Article 286 (2) on the taxability of inter-State sales or purchases of the kind envisaged by the *Explanation* to clause (1) (*a*) his Lordship said :

> "We are of opinion that the operation of clause (2) stands excluded as a result of the legal fiction enacted in the *Explanation* and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the *Explanation* in regard to inter-State dealings is, in our view, to invest what, in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and clause (2), can, therefore, have no application. . . . The *Explanation* envisages sales or purchases under which out of State goods are imported into the State. That is the essential element which makes such a transaction inter-State in character and if it is turned into an intra-State transaction by the operation of the legal fiction which blots out from view the inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its inter-State character. The statutory fiction completely makes the inter-State character of the sale or purchase which, as a collateral result of such making, falls outside the scope of clause (2) ".

This decision was rendered on the 30th March, 1953, and held the field till 6th September, 1955, when the Supreme Court again by a majority, disapproved of it in the *Bengal Immunity Co. Ltd.* v. *State of Bihar*[1]. In the later case, the majority of the Court decided that the *Explanation* to clause (1) (*a*) of Article 286 could not legitimately be extended to clause (2), either as an exception or as a proviso, or be read as curtailing or limiting the ambit of that clause. Their Lordships, therefore, held that it followed that

> " except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce, irrespective of whether such sales or purchase do or do not fall within the *Explanation* ".

They further held that

> "a delivery State could not tax by reason of clause (2), although the sales fall within the *Explanation* to Article 286 (1) (*a*) ".

And that

> " other States could not tax by reason of both clauses (1) (*a*) read with the *Explanation*, i.e., as being an ' outside ' sale as also Clause (2) of Article 286 of the Constitution."

It was to remedy the dis-equilibrium in the finances of the several States, which would have been bound to refund the tax which they had collected on the basis of the interpretation of the Supreme Court in the *United Motors Case*[2], that Ordinance III of 1956 was promulgated.

The questions therefore to be considered are : (1) were the sales covered by *Explanation* to Article 286 (1) (*a*) which we shall for brevity call " Explanation sales ", liable to tax under the Madras General Sales Tax Act, between the period 1st April, 1951, and 6th September, 1955, (2) were sales, other than " Explanation sales ", which however had elements of an inter-State character, liable to tax under the State Law between the dates mentioned in the Ordinance ?

We shall first consider the " Explanation Sales ", *i.e.*, those treated as inside sales by the *Explanation* to Article 286 (1) (*a*). In regard to these sales, we are of the opinion, that in cases where the property did not pass in this State, the main portion of the definition, of ' sale ' in 2 (*h*) was not attracted, and as the goods were outside the State at the time of the contract the transactions were not brought within *Explanation* (2) of the definition. This was the position when the Constitution came into force.

The learned Advocate-General submitted that on the coming into force of the Constitution, the ' Explanation sales ' became taxable by virtue of the Constitution itself, the argument being, that just as the prohibitions of the Constitution were self-acting, without any need for State legislation, sales, which therefore might have been ' outside ' sales became automatically ' inside sales '. We are not able to accept this position as correct. Though the prohibitory or negative provisions of the Constitution might be self-acting, the provisions such as that found in the *Explanation* to Article 286 (1) (*a*) cannot fall within that category. The provision is enabling in its nature, and its only effect is to define the scope of the constitutional exemption granted by the main portion of Article 286 (1) (*a*) from State taxation. It would, therefore, need State legislation to give effect to it, and the Constitution cannot, by itself, be deemed to alter the State Law, so as to impose a tax on ' Explanation Sales ' if none existed before. As we have already pointed out, the State purported to tax only sales 'within the State,' and this has to be understood as meaning sales where the property in the goods passed within the jurisdition. Where the goods were outside, and the property also passed outside the State, the fact that they were brought over into the State for delivery or consumption was not by itself an element which attracted tax liability on the terms of the Madras General Sales Tax Act as it stood on 26th January, 1950.

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[1] (1955) S.C.J. 672 : (1955) 2 M.L.J. 168 : 6 S.T.C. 446 : (1955) 2 S.C.R. 603 (S.C.).

[2] (1953) S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. (S.C.) 743; 4 S.T.C. 133 (S.C.).

We, however, consider his alternative submission based on the terms of section 22 of the Act well-founded. The argument was that even if the " explanation sales ", where the property in the goods passed outside the State, were not within the Madras General Sales Tax Act, read in the light of the Constitution, the position was altered when section 22 was introduced by the Adaptation of Indian Laws (Fourth Amendment) Order. As we have already indicated, the effect of section 22 was to render a sale " within the State ", one which fell under the *Explanation* to Article 286 (1) (*a*), so that, from that date, such sales became taxable under the Sales Tax Act, notwithstanding that in some cases, an inter-State element might have been involved in the transaction. This really did not affect the enforceability of the levy in view of the decision of the Supreme Court in the *United Motors Case*[1], which held that ' Explanation sales ' were outside the fetter imposed by Article 286 (2). But when this view was overruled by the Supreme Court in the *Bengal Immunity Case*[2], the position which emerged was, that though these sales were " inside " sales for the purposes of the Sales Tax Act, the tax upon them became obnoxious to the provisions of Article 286 (2), and, therefore, they would have been exempt from tax. The Ordinance, therefore, applies to such sales, and the tax liability arising thereon, and after the Ordinance, the exemption based upon Article 286 (2) would no longer be applicable. The conditions of the Ordinance are therefore fully satisfied.

Mr. Subbaraya Aiyar, learned counsel for the petitioner assessee, drew our attention to a passage in the judgment of the Supreme Court in the *Bengal Immunity Case*[2], where his Lordship the Chief Justice refers to the fact, that in the Bihar Act, the *Explanation* to Article 286 (1) (*a*) was introduced, as an explanation to the definition of ' sale ', the argument being that unless this were done, it could not be said that what might be termed the explanation sales were sales liable to tax under the Sales Tax Act. We are of opinion, that there is no difference in the legal effect achieved by the different methods of drafting adopted in Madras and Bihar. Section 22, with the *Explanation* of what an " inside " sale is, must be read as really part of every provision in the Act, and so read, the same result is achieved as in Bihar.

As the transactions involved in T.R.C. No. 129 of 1955 belong to the category we have termed 'explanation sales', the above would be sufficient to dispose of this revision petition. But as a number of other cases which were heard along with T. R. C. No. 129 of 1955 are concerned with transactions, where the goods were in this State at the time of the contract, but were transported to other States by reason of the sale, we propose to discuss next the effect of the Ordinance on the tax liability on such transactions also, as we consider that it would tend to convenience as well as completeness.

This other category of cases would comprise those, where goods in this State are the subject of a sale, and where the sale transaction involves inter-State elements, *i.e.*, where the transport from this State across its border is an intergrated part of

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1. (1953) S.C.R. 1069 : (1953) S.C.J. 373 : (1953) 1 M.L.J. (S.C.) 743 : 4 S.T.C. 133.

2. (1955) 2 M.L.J. 168 : (1955) S.C.J. 672 (1955) 6 S.T.C. 446 ; 1955 (2) S.C.R. 603.

the sale. It will be seen that these sales would have been liable to tax prior to the Constitution by reason of the extended definition of sale introduced by the Amending Act of 1947, and which now figures as *Explanation* (2) to section 2 (*h*) of the Act. Tax on such sales could have been lawfully levied even after the Constitution came into force by virtue of the President's Order, dated 26th January, 1950, which postponed the application of the prohibition contained in Article 286 (2), upto 31st March, 1951. When the Presidential Order expired on the 1st of April 1951, the levy of the tax became subject to the ban imposed by Article 286 (2). In other words, sales tax was levied by this State, only it was unenforceable by virtue of the protection afforded by Article 286 (2). This position continued, however, only until section 22 was introduced into the Sales Tax Act. The relevant portion of that section, which we have already extracted runs :

> "Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place except in so far as Parliment may, by law, otherwise provide after the 31st day of March, 1951, in the course of inter-State trade and commerce, and the provisions of this Act shall be read and construed accordingly."

The effect of this was, that the ban, which theretofore was imposed by the Constitution, became incorporated into the definition of sales which were subject to tax, and until Parliament chose to legislate by loosening the fetter, the State imposed no tax on such sales. In other words, just as " explanation sales " became taxable by virtue of section 22, the present category of sales, *i.e.*, where the goods were originally in this State but were taken out as a result of the sale was rendered not subject to tax by so to speak modifying the content of *Explanation* (2) to section 2 (*h*). This provision, which incorporated the constitutional ban into the texture of the State Act, had the effect, therefore, of negativing the tax liability as distinguished from the constitutional ban which theretofore operated on such imposition. This state of things, however, was to last only till Parliamemt by law otherwise provides.

The argument which the learned Assistant Government Pleader presented to us was that the Ordinance was a law made by Parliament "providing otherwise", and as the Ordinance in terms referred to sales, to which the ban imposed by Article 286 (2) applied, and lifted the ban in regard to sales between the two dates mentioned in it, sales effected during that period became liable to tax under the Madras Act. Though the argument is attractive, we are satisfied that it is not sound. In the first place, section 2 of the Ordinance in terms removes the fetter on the taxation of inter-State sales only in cases where there was a pre-existing State Law providing for such an imposition, and where the only impediment on the levy and collection of such tax was the ban imposed by Article 286 (2). That such a test was satisfied is exactly the basis on which we have held that the tax on "explanation sales " possessing an inter-State character could be validly collected by reason of the Ordinance. If *ex hypothesi* there was no tax on the sales covered by the *second explanation* to section 2 (*h*) after the enactment of section 22, the condition posited by the Ordinance is not satisfied andhence the Ordinance cannot be availed of by the State. Secondly we feel unable to accept an argument, which imputes to the Ordinance a twin effect of imposing a tax on such transaction and validating its levy. Parliament cannot impose a tax on sales ; the imposition could be effected by State legislation, Parliament can relax the fetter imposed by Article 286 (2) and nothing more. Nor are we impressed by the contention, that section 22 should be regarded as a piece of conditional legislation, *i.e.* an enactment which levied a tax on inter-State sales, subject to the condition of the liability being dormant so long as the ban imposed by Article 286 (2) continued to operate and that when the ban was removed the tax liability became automatically attracted. In our opinion the submission in this form also suffers from the same fallacy, *viz.*, it imputes to Parliament the power to enact a sales tax legislation for the State. If the State Legislature itself passed a law imposing a tax, it could take advantage of the lifting of the ban under Article 286 (2) by the Ordinance but section 22 in its present form is not apt to achieve that purpose.

Reverting to the facts of this revision case we are clearly of the opinion that a the cotton was delivered in this State for consumption here, it was subject to tax under the Madras General Sales Tax Act, between the dates mentioned in the Ordinance, and that as the only objection to the liability to tax could be rested on the provision in Article 286 (2), the same is overcome by the Ordinance. The order of the Tribunal disallowing the item is therefore correct, and this revision petition fails and is dismissed.

There will, however, be no order as to costs.

R.M. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

A.K.D. Rangaswami Raja and another .. *Appellants**.

Constitution of India (1950), *Article* 227—*Order of single Judge of the High Court on the Original Side—Whether revision lies—Letters Patent* (*Madras*), *Clause* 15 *and Order* 27, *Rule* 14, *Madras High Court Original Side Rules—Order giving liberty to adduce further evidence—Whether a 'judgment' from which an appeal lies.*

Article 227 of the Constitution is confined to subordinate Courts and a Judge of the High Court as such is not subordinate to the High Court and a Civil Revision Petition against the order of the Judge of the High Court on the Original side is not competent under this Article.

Sahaba Reddy v. *Venkata Reddy*, (1953) 2 M.L.J. 108, followed.

An order of the Judge on the Original Side of the High Court giving liberty to adduce further evidence and evidence by way of rebuttal is not a 'judgment' within the meaning of clause 15 of the Letters Patent and an appeal is not competent from such an order.

Asrumati Debi v. *Rupendra Deb Raikot*, (1953) S.C.R. 1159: 1953 S.C.J. 300: (1953) M.L.J. 710 (S.C.) referred.

Appeal sought to be preferred against the order of the Mr. Justice Balakrishna Ayyar, dated 11th September, 1956, and made in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 1994 of 1956 in C.S. No. 30 of 1956.

These cases were posted for orders on the questions

Whether S.R. Nos. 32993 and 32996 of 1956 presented as civil revision petitions under Article 227 of the Constitution of India to revise the order of a single Judge of the High Court on the original side are maintainable and,

Whether S. R. Nos. 32989 and 32991 of 1956 preferred under Clause 15 of the Letters Patent and Order 27, rule 14 of O. S. Rules alternatively as original side appeals are maintainable against the same order which has not conclusively determined the rights of parties so as to put an end to the suit or proceedings so far as the Court before which such suit or proceeding is concerned :

K. Krishnaswami Ayyangar for *R. Desikan* for Appellants and Petitioners.

The Court made the following

ORDER—*S. R. Nos.* 32993 *and* 32996.—These relate to two memoranda of Civil Revision Petitions purporting to be under Article 227 of the Constitution against the order of a learned Judge of this Court on two interlocutory applications on the original side of this Court in two suits now pending on the original side of this Court having been transferred from the District Court of Ramnad. In *Sahaba Reddy* v. *Venkata Reddy*[1], to which one of us was a party, it was decided that Article 227 of the Constitution is confined to subordinate Courts and a Judge of the High Court as such is not subordinate to the High Court and a Civil Revision Petition is not competent against an order of a learned Judge of this Court under that Article. This view has been followed by other Division Benches of this Court. The papers in these two S. R. Nos. must be returned to the party as the revision petitions sought to be preferred are not competent.

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* S.R. Nos. 32989, 32991, 32993 and 32996 of 1956. 8th October, 1956.

[1] (1953) 2 M.L.J. 108.

S. R. Nos. 32989 *and* 32991 of 1956.—These relate to two original side appeals sought to be preferred under Clause 15 of the Letters patent against the same order of the learned Judge. In substance, by this order the learned Judge directed that the fourth defendant in C. S. No. 30 of 1956 shall have liberty to adduce further evidence on the first part of issue 2 and also adduce evidence in and by way of rebuttal on the latter part of issue 2. The learned Judge also observed that the opposite side will be given the fullest opportunity of meeting the evidence adduced by the fourth defendant.

We heared Mr. K. Krishnaswami Ayyangar, learned counsel for the plaintiff-appellant, at considerable length. He contended that the order was a judgment within the meaning of that word in Clause 15 of the Letters Patent. He cited to us and relied upon the decisions of the Calcutta High Court in *Koramall Ramballav* v. *Mongilal Dalimchand*[1]. *Lea Badin* v. *Upendra Mohon Roy Chaudhury*[2], *Chandi* v. *Jnanendra*[3], and *Mathura Sundari Dasi* v. *Haran Chandra Saha*[4]. He drew our attention to the leading judgment of this Court in *Tuljaram Row* v. *Alagappa Chettiar*[5], and to the recent judgment of the Supreme Court in *Asrumati Debi* v. *Rupendra Deb Raikot*[6]. We do not, however, think it necessary to examine each of these cases because we find ourselves in the happy position in which the Supreme Court found itself in *Asrumati Debi* v. *Rupendra Deb Raikot*[6], and, because we are satisfied that in none of the views referred to in any of these decisions, can an order of the character which is sought to be appealed against be regarded as a judgment within the meaning of Clause 15 of the Letters Patent. The appeals sought to be preferred are, therefore, not competent. The papers will be returned to the party.

V.S. —— *Papers returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Madura Knitting Co., Madura .. *Applicant**

v.

Commissioner of Income-tax & Excess Profits-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (x)—Applicability—Reasonableness of payment made by employer to employee and claimed as deduction—Test—Commercial expediency—Commission paid to employee on net profits as incentive to produce more goods so that assessee could earn more net profits—If permissible deduction—Proviso (b) "Profits"—If would exclude net profits—Section 10 (2) (xv)—Applicability—Conditions of—Excess Profits Tax Act, Schedule I, Rule 12—Scope of—Benami—Plea and proof—Onus—Question whether a firm was real or bogus, whether profits made by it should be treated as profits of another firm—Test to decide—Finding of Tribunal—Sustainability—Income-tax Act, sections 33 and 66.

Where a claim is made by an employer under section 10 (2) (*x*) of the Income-tax Act, the reasonableness or otherwise of the payment made to an employee has to be judged, not with reference to any subjective standards of the assessing authority, but with reference to commercial expediency, and with specific reference to the factors listed in clauses (*a*), (*b*) and (*c*) of the proviso to sub-section (10) (2) (x). It cannot be said that there can be no tie between the efforts put in by an employee and the net profits made by the assessee-employer on the ground that net profits do not depend upon production alone. That other factors enter into the making of net profits certainly would not make net profits of the assessee an irrelevant factor in deciding whether the payments made to the employees were reasonable. It is a very relevant factor and should not be excluded. When the legislature in its wisdom has correlated the payments to profits (in clause (*b*) of the proviso) and prescribed that as one of the tests to decide whether the payments are reasonable, it is certainly not for the Income-tax authorities to disregard that. "Profits" in clause (*b*) of the proviso would not exclude net profits. Therefore a commission on the net profits paid by the employer to the employee as a sort of incentive to the employee to produce more goods so that the assessee's profits might increase would be a permissible deduction under section 10 (2) (x) of the Act ; likewise it would be a permissible deduction from computation for purposes of Excess Profits Tax under Rule 12 of Schedule I to the Excess Profits Tax Act.

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1. (1919) 23 C.W.N. 1017.
2. (1934) 39 C.W.N. 155.
3. 29 C.L.J. 225.
4. (1915) I.L.R. 43 Cal. 857.
5. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1.
6. (1953) S.C.R. 1159 : 1953 S.C.J. 300 : (1953) 1 M.L.J. 710 (S.C.).

* Referred Cases Nos. 97 of 1953 and 93 of 1955. 24th April, 1956.

To attract the application of section 10 (2) (xv) of the Income-tax Act, two factors at least have first to be proved by the assessee : (1) that the amount claimed had been expended and (ii) that the payment had been made for services rendered to the assessee by the recipients of the amount, when the case of the assessee is that he has paid the amount for the purpose of his business. After establishing both these factors, the assessee has still to satisfy the test prescribed by section 10 (2) (xv), namely, that the expenditure has been incurred wholly and exclusively for the purpose of his business.

In considering whether this test has been satisfied, the view-point should be commercial expediency. But if either of the preliminary factors has not been proved, that is, if no payment were made which was not correlated to any services rendered to the assessee, the question whether commercial expediency would sanction the claim that the money has been expended wholly and exclusively for the business of the assessee cannot arise at all for consideration.

When the requirements of section 10 (2) (xv) of the Income-tax Act are not satisfied because the payments, even if made, were not correlated to any services rendered by the recipients, no question of deduction under section 10 (2) (xv) of the Income-tax Act or under rule 12 of Schedule I to the Excess Profits Tax Act can arise.

The question referred to the High Court under section 66 (1) of the Income-tax Act was :

"Whether there was material for the Tribunal to hold that the partnership of Ambal Stores was not genuine, and that the profits of Ambal Stores should be treated as the profits of the assessee firm Madura Knitting Company".

The finding of the Income-tax Officer was "that Ambal Stores is only a bogus creation and that it is really a branch of Madura Knitting Company."

The Appellate Assistant Commissioner held "I agree with the Income-tax Officer that Ambal Stores is really a leak device introduced between Madura Knitting Company and the exporters abroad for taking out the surplus profits arising on sales for exports". The Appellate Tribunal recorded : "The fact relating to Ambal Stores are given *in extenso* in the Income-tax Officer's order and the Appellate Assistant Commissioner's order. . . . . . we are firmly convinced that this is a simulate arrangement to divert the profits and we would accordingly set our face against treating this as a genuine one".

It was never the case of the department that the transactions conducted by the partnership Ambal Stores were conducted for the benefit of the partnership Madura Knitting Company. The partnership Ambal Stores was treated as a real one by the Income-tax authorities when they accorded registration to that firm under section 26-A of the Income-tax Act, and the authorities also treated it as a real entity when they taxed its profits.

Some of the factors relied on by the department were :

(1) Ambal Stores conducted its business in a place which belonged to the father of the partners of that firm who was one of the partners of Madura Knitting Company ; and the partners of Ambal Stores paid no rent to him ;

(2) An employee of another firm, Colours Trading Company, did the clerical work of a Ambal Stores without any payment from the latter. [There was, however, no identity between Madura Knitting Company and Colours Trading Company though three of the partners of the latter company were also partners of the former company.]

(3) The same commission agent acted both for the Madura Knitting Company and Ambal Stores.

(4) Ambal Stores deposited its funds with Colours Trading Company. [But Colours Trading Company credited interest on the amounts at 6 per cent. It was never the case of any one that Colours Trading Company and Madura Knitting Company constituted one business concern ; nor was any evidence adduced to show that any of the money deposited by Ambal Stores with Colours Trading Company found its way to Madura Knitting Company.]

Held : (1) that the facts relied on were not of much evidentiary value and not conclusive at all ;

(2) Benami would imply that that the partnership Ambal Stores was a real concern, as real as the assessee Madura Knitting Company, and a plea of benami would really raise the problem, who was the beneficial owner.

(3) Quite apart from the fact that had it been a plea of benami, or of sham, the burden would have lain on the department to prove that what was apparent was not real, there was no evidence to sustain any finding that Ambal Stores conducted its operations and accumulated its profits for the benefit of any one else, and that was not the specific plea that either the departmental authorities or the Tribunal ever investigated. The evidence was all one way that Ambal Stores was a real entity and was not a sham concern.

(4) Neither the departmental Authorities nor the Tribunal made a correct approach to the question or examined the evidence freed of the obsession that whatever a partner of a Ambal Stores was interested in or whatever the Colours Trading Company was shown to have been interested in accrued to Madura Knitting Company, and therefore, there was no evidence on record on which the Tribunal could come to the conclusion that the partnership Ambal Stores was not a real concern and that the profits made by Ambal Stores accrued either as a fact or in law to Madura Knitting Company.

(5) The real test the Tribunal should have adopted was, if the Madura Knitting Company claimed all the profits earned by Ambal Stores as really belonging to the Madura Knitting Company, "was there any material on record on which any Court or Tribunal could sustain such a claim"; there was no evidence on record which could possibly sustain such a claim.

Cases referred to the High Court by the Income-tax Appellate Tribunal under sections 66 (1) and 66 (2) of the Income-tax Act, 1922, in R.A. Nos. 435 and 436 of 1950-51 (E. P. T. A. Nos. 60 and 61 of 1949-50) and R. A. Nos. 796 to 806 of 1953-1954 (I.T.A. Nos. 6308-6311 of 1951-1952, E.P.T.A. Nos. 519 and 520 of 1951-52 and B.P.T.A. Nos. 116 to 120 of 1951-52, respectively) on its file.

M. Subbaroya Ayyar, V. Sethuraman and *S. Padmanabhan* for Applicants.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—Two questions were referred under section 66(2) of the Income-tax Act in R.C. No. 97 of 1953 and four more under section 66 (1) in R.C. No. 93 of 1955. These questions arose out of proceedings to assess the Madura Knitting Company to Income-tax and Excess Profits Tax during the assessment years 1945-1946, 1946-1947, 1947-1948 and 1948-1949. Whether it was liable to Income-tax or to Excess Profits Tax, the factors for consideration were virtually the same with reference to each of two of the three items in dispute: (1) commissions paid by the assessee company to Krishnaram, Khamadenu & Company and Sekhar & Company; (ii) comissions paid to seven employees who held managerial posts. The third item in dispute was as regards the profits earned by the partnership concern known as Ambal Stores. The questions as framed and referred to this Court mixed up to some extent the three different heads of disputed liabilities, and we would prefer to discuss first the questions at issue between the assessee company and the Department, independent of the frame of the questions.

The Madura Knitting Company consisted of seven partners, drawn from three family groups, and each had a third share. The N.M.R. family group consisted of three brothers, Venkatakrishna Iyer, Subbaraman and Krishnamurthi. They were divided *inter se* and each had a ninth share. The V.S.M. family group consisted of Gopalakrishna Iyer, Rajaramier and Mohanram. They were also divided *inter se* and each of them had a ninth share. The sole member of the other family unit was M. K. Ramaswami Iyer, who had a third share. Venkatakrishna Iyer, Subbaraman, Krishnamurthi and Ramaswami Iyer has each married a sister of the V.S.M. brothers.

The three N. M. R. brothers had other business activities besides those of the Madura Knitting Company. They were partners of the Colours Trading Company, a concern wholly independent of the Madura Knitting Company. These three along with others were also partners of the Rayal Talkie Distributors, a concern independent of the Madura Knitting Company and the Colours Trading Company. N.M.R. Venkatakrishna Iyer was a partner in each of these three concerns, but what we should remember and what the departmental authorities and the Tribunal apparently endeavoured to forget was that he was only one of the partners.

Four of the married daughters of N.M.R. Venkatakrishna Iyer constituted a partnership which traded under the name of Ambal Stores. It is enough at this stage to record two other features of this partnership. It bought goods of the Madura Knitting Company, sold them and derived fairly large profits. In the rest of this judgment we can refer to the Ambal Stores as " the partnership " The partnership banked its monies with Colours Trading Company, which paid interest at six per cent. per annum on the amounts to the credit of the partnership.

It is against this background that we have to consider the questions at issue and the evidence bearing thereon.

We shall first deal with the question of the profits earned by the partnership, Ambal Stores. The Tribunal upheld the decision of the departmental authorities, that the profits made out of the trading activities of the Ambal Stores Rs. 18,030 and Rs. 1,07,199 should be assessed as the profits of the assessee Company, Madura Knitting Company, for the assessment years 1947-1948 and 1948-1949, respectively. It is the correctness of that decision that question No. 3 in R.C. No. 93 of 1955 raises for adjudication.

The partnership firm of Ambal Stores consisted of four ladies C.R.B. Jayammal, S.S.E. Kamala, M.P.V.R. Padmasani and P.A.B.K.A. Nirmala. The fourth, Nirmala, was a minor and she was admitted to the benefits of the partnership. They were all married and their husbands were men of affluence. The deed of partnership was, dated 27th January, 1947. The partnership was registered by the Income-tax authorities themselves under section 26-A of the Income-tax Act, and the profits of the partnership were also assessed to income-tax in the relevant assessment years. It was only a nominal capital of Rs. 2,400 that was contributed by the three adult partners. But then the business was such that no larger capital was needed. The Madura Knitting Company sold a portion of its products to Ambal Stores and that firm in its turn sold the goods for export outside India to persons who held quota permits. The constituents of the partnership were comparatively few in number not more than nine as is apparent from an affidavit, dated 10th March, 1952. Of these U. P. Agencies, Banares, was one. These nine constituents were not old customers of the Madura Knitting Company. The Madura Knitting Company charged the Ambal Stores for the goods sold to that firm the same prices it charged the other wholesale buyers, and no special concession was shown to have been extended to the partnership by the Madura Knitting Company itself. It was, however, not disputed that the partners of Ambal Stores had not engaged themselves in any trading activity prior to January, 1947. The partnership claimed to have carried on its business at 120, South Masi Street, Madurai. That house belonged to the father of the partners N. M. R. Venkatakrishna Iyer, and they did not pay any rent. The partnership had no godown, but then it needed none, as the goods it obtained of the Madura Knitting Company were cleared almost immediately after, by the constituents of the partnership, to whom it sold the goods. Baluswami Iyer, an employee of the Colours Trading Company, attended to the clerical work of the Ambal Stores. All funds of the partnership —and the profits it earned were the main items of those funds—were deposited with the Colours Trading Company which paid interest at six per cent. per annum on those deposits. The profits of the partnership were apportioned between the partners, and these were duly recorded in their books. Barring the amounts drawn for payment of income-tax, there were very few occasions when any of the partners of the Ambal Stores drew monies for their own needs. Even these were subsequent to the assessment years in question. On such occasions the required money was drawn by the partnership from the Colours Trading Company and the partners' accounts in the books of Ambal Stores were duly debited with those withdrawals. There was, however, nothing in the evidence on record to show that the amounts to the credit of the partnership, Ambal Stores, with the Colours Trading Company were drawn upon by anyone else, either Venkatakrishna Iyer, or the Colours Trading Company or the Madura Knitting Company.

The finding of the Income-tax Officer in his assessment order for 1947-1948, with reference to the assessee, the Madura Knitting Company was :

> " Taking all these facts into consideration, the only conclusion that one can draw is that the Ambal Stores is only a bogus creation and that it is really a branch of the Madura Knitting Company ".

At least there was something definite and precise about this finding, which could not really be claimed of the findings either of the Appellate Assistant Commissioner or of the Appellate Tribunal. The Appellate Assistant Commissioner recorded :

> " I agree with the Income-tax officer that the Ambal Stores is really a leak device introduced between the Madura Knitting Company and the exporters abroad for taking out the surplus profits arising on sales for exports ".

The Tribunal recorded :—

> "The facts relating to Ambal Stores are given *in extenso* in the Income-tax officer's order and the Appellate Assistant Commissioner's order and it is not necessary for us to reproduce them here. We are firmly convinced that this is a simulate arrangement to divert the profits and we would accordingly set our face against treating this as a genuine one ".

Before we deal with the question whether there was any evidence on record to sustain the finding of the Tribunal, we have to point out that it was apparently never the case of the Department, that the transactions were conducted by the partnership, Ambal Stores, for the benefit of the assessee, the Madura Knitting Company. Benami would imply that the partnership was a real concern, as real as the assessee company ; only the assessee company alone was entitled to the profits earned. A plea of benami would really raise the problem, who was the beneficial owner. Was it Venkatakrishna Iyer, the father of the four partners of Ambal Stores who gave them the business premises free of rent, or was the beneficial owner the Colours Trading Company which had the use of all the monies of the partnership, though with a liability to pay interest, and which lent the services of one of its employees Baluswami Iyer to the partnership? Or was the beneficial owner the Madura Knitting Company, which treated the partnership of Ambal Stores, just like any of its other constituents? If either Venkatakrishna Iyer or the Colours Trading Company was the benifiicial owner of the trade to which the Ambal Stores merely lent its name, that would certainly be enough to negative any possible claim of the Madura Knitting Company, that the profits earned by Ambal Stores really belonged to the Madura Knitting Company. That Venkatakrishna Iyer was a common factor in relation to himself, the Colours Trading Company and the Madura Knitting Company would certainly not be enough to prove that whatever Venkatakrishna Iyer or the Colours Trading Company got, really belonged to the Madura Knitting Company.

Quite apart from the factor, that had it been a plea of benami, the burden would have lain upon the Department to prove that what was apparent was not real, there was no evidence to sustain any finding that the partnership Ambal Stores, conducted its operations and accumulated its profits benami for the benefit of anyone else. But then, as we pointed out earlier, that was not the specific plea that either the Departmental authorities or the Tribunal ever investigated.

The position would have been the same if the Tribunal confused the issue and was really of the view that it was a case of benami when it recorded that the Ambal Stores was a sham or bogus concern. The Tribunal, it should be remembered, called it a "simulate arrangement ". One thing, however, seems to us to be clear. The Tribunal failed to keep a correct perspective, to keep apart from one another the identity of the Madura Knitting Company, the Colours Trading Company, Venkatakrishna Iyer and the Ambal Stores.

If the question at issue is narrowed down to the reality of the partnership, Ambal Stores, we are clearly of the opinion that the evidence is all one way, to prove that the partnership was a real entity. There was really no evidence at all to prove that it was a sham concern.

In dealing with the contention of the assessee "the firm (Ambal Stores) was registered under the Indian Income-tax Act, and that it would not be correct on the part of the Departmental officers to breathe hot and cold about the genuineness of the firm" the Tribunal observed :

> " . . . . . . the Departmental Representative mentioned that the assessment made on Ambal Stores was only precautionary one so that revenue might not be lost in case Ambal Stores was held to be a genuine partnership by the higher authorities. The Department's case, he strenously urged, was as strong as ever in spite of it (Ambal Stores) being assessed as a separate registered firm. We are of the view that simply because the Department made precautionary assessment that, by itself, without any other supporting evidence, would not prove the genuineness of the firm ".

We have first to observe, whether the plea was one of benami or of sham, that the burden lay not upon the assessee company but upon the Department to prove that what was apparent was not real. The assessee pointed out two facts : (i) that the partnership, Ambal Stores, was treated as a real one by the Income-tax authorities when they accorded registration to the firm under section 26-A of the Act; and (*ii*) the Income-tax authorities treated the Ambal Stores as a real entity when they taxed its profits. With reference to the second factor the Tribunal observed that it was a case of precautionary assessment. The first factor they ignored. It is difficult to envisage a precautionary registration under section 26-A of the Act. Thus, the contention of the assessee was well-founded that for the purpose of taxing the Ambal Stores the Departmental authorities accepted the partnership as a real concern; the registration still stood. When dealing with the Madura Knitting Company, however, the Income-tax authorities elected to treat the registered concern, Ambal Stores, as a bogus concern, a sham concern, a concern which had no existence at all. Of course, it is not for us to balance the evidence for and against the conclusion drawn by the Tribunal. But that the Tribunal overlooked a very relevant factor that the partnership, Ambal Stores, was recognized as a real concern when it was registered under section 26-A of the Act, is quite clear.

One of the factors on which both the Income-tax Officer and the Appellate Assistant Commissioner relied was that the premises, 120, South Masi Street, Madurai, in which the partnership conducted its business belonged to the father of the partners N.M.R. Venkatakrishna Iyer and that the daughters paid no rent to him. Once again we have to point out that to confuse the identity of Madura Knitting Company with one of its partners, Venkatakrishna Iyer, is not a correct approach. Whatever belonged to Venkatakrishna Iyer certainly could not be claimed to belong to the Madura Knitting Company. In deciding the question at issue whether the trading operations conducted in the name of Ambal Stores were for the benefit of the Madura Knitting Company, the fact that the business premises of Ambal Stores belonged to Venkatakrishna Iyer, one of the seven partners of the Madura Knitting Company, can have no evidentiary value at all. That no rent was paid to Venkatakrishna Iyer for those premises did not in any way affect the Madura Knitting Company or enlarge its rights.

Similarly, the fact that Baluswami Iyer, an employee paid out of the funds of the Colours Trading Company, did the clericial work of Ambal Stores, without any further payment from the funds of Ambal Stores, can have no evidentiary value to decide whether whatever the Ambal Stores did was on behalf of and for the benefit of the Madura Knitting Company. There was no identity between the Madura Knitting Company and the Colours Trading Company, though three of the partners of the Colours Trading Company were also partners of the Madura Knitting Company. The Income-tax officer pointed out:

> " Purchase invoices have been signed by N. M. R. Venkatakrishna Iyer on behalf of the Madura Knitting Company and all sales bills have been signed by one R. M. Baluswami Iyer".

Madura Knitting Company was the seller and there was nothing suspicious in Venkatakrishna Iyer signing on behalf of the company as seller. We have already referred to the fact that Baluswami Iyer, who acted on behalf of the Ambal Stores, was certainly not an employee of the Madura Knitting Company.

The Income-tax officer further observed:

> " No orders are seen to have been booked straight but only through P. D. Rangier, who is a commission agent of Madura Knitting Company ".

The finding was not that he was an employee of the Madura Knitting Company, or that anything that Rangier did was to the detriment of the Madura Knitting Company.

Surely a commission agent can work for more than one principal; and that the same commission agent was employed by more than one concern would not prove that all the concerns should be treated as one for the purposes of the income-tax.

The Departmental authorities and the Tribunal commented on the fact, that the partnership, Ambal Stores, deposited its funds with the Colours Trading Company. They overlooked the fact that the books of the Colours Trading Company showed that the partnership was credited with interest at six per cent. per annum. It was never the case of any one, that the Colours Trading Company and the Madura Knitting Company constituted one business concern. What benefit the Colours Trading Company derived by retaining the deposits of Ambal Stores, it certainly did not share with the Madura Knitting Company. There was no evidence at all to prove that any of the monies accumulated by Ambal Stores found its way to the Madura Knitting Company ; nor was there anything to show that the Madura Knitting Company could lay a legal claim to the profits made by the Ambal Stores.

The real test that the Tribunal should have adopted was if the Madura Knitting Company claimed that all the profits earned by the Ambal Stores really belonged to the Madura Knitting Company, was there any material on record on which any Court or Tribunal could sustain such a claim ? We are unable to see any evidence on record which could possibly sustain such a claim.

The Tribunal observed :

> " During the course of hearing we pointedly put the question to the assessee's representative as to why quota-holders could not purchase goods directly from the Knitting Company, instead of going to Ambal stores whose existence they might or might not be aware. The representative at once blurted out that the quota-holders were new customers and as such the Knitting Company would not supply goods to them. If that were so, Ambal Stores also was a new customer and there is no reason why the assessee should favour Ambal Stores to the other quota-holders who are regular dealers in that line of business and from whom the assessee could normally expect longstanding business dealings. This fact is just mentioned to show the hollowness of the claim ".

Apparently the Tribunal overlooked the fact, that the Madura Knitting Company claimed to have employed selling agencies. But independent of that there was ample evidence, on which the Tribunal relied for other purposes, to show that the Madura Knitting Company sold their goods to a number of wholesalers all over India. If the gravamen of the charge was that the Madura Knitting Company could have itself sold the goods to the exporters direct and made the profits, itself, without employing any of the wholesalers and, at any rate, without employing Ambal Stores, even that would not help to establish that the profits really accrued to the Madura Knitting Company, or that the Ambal Stores had no legal existence at all. Once again we have to point out that it was common ground that the Ambal Stores was not treated differently by the Madura Knitting Company, nor accorded any privilege which was withheld from any of the concerns to which the Madura Knitting Company sold its products.

As we see it, neither the Departmental authorities nor the Tribunal examined the evidence on record freed of the obsession, that whatever Venkatakrishna Iyer was interested in or whatever even the Colours Trading Company was shown to have been interested in really accrued to the benefit of the Madura Knitting Company. We have no hesitation in coming to the conclusion, that there was no evidence on record on which the Tribunal could come to the conclusion, that the partnership, Ambal Stores, was not a real concern, and that the profits made by Ambal Stores accrued either as a fact or in law to the Madura Knitting Company.

During the arguments before us learned counsel for the assessee company produced the accounts of the Ambal Stores which showed that one of the partners Jayammal had withdrawn on three occasions monies for her own use, once in 1951 and twice in 1952. Similarly, another partner, Kamalam, was shown to have withdrawn monies for her own use on two occasions in 1953. These were transactions subsequent to the relevant assessment years we have had to consider. We do not propose to let this factor influence our decision one way or another. We have already pointed out that there was no evidence on record to show that the profits that accrued to Ambal Stores were drawn upon or utilised by the Madura Knitting Company or for the matter of that even by the Colours Trading Company or by Venkatakrishna Iyer.

Question No. 3 in R.C. No. 93 of 1955 runs :

> " Whether there was material for the Tribunal to hold that the partnership of Ambal Stores was not genuine and that the profits of Ambal Stores should be treated as the profits of the assessee firm for the assessment years 1947-48 and 1948-49 ".

Our answer to that question is in the negative and in favour of the assessee.

Question 4 in R.C. No. 93 of 1955, which we shall consider next runs :

> " Whether the commission paid to the factory and sales managers of the assessee's firm for the assessment years 1946-47 to 1948-49 is not an allowable expenditure or deduction, under section 10 of the Income-Tax Act? "

Ancillary to that was the claim of the assessee to deduction of these payments from computation for purposes of Excess Profits Tax, for the chargeable accounting period ending 31st March, 1946. That was included in the second question in R.C. No. 97 of 1953.

These employees of the assessee company, Raja Devadoss, P. R. Sundararaman, P. R. Krishnamurthi, S. K. Sundararamier, D. M. Sundararajier and R. P. Govinda Iyer held managerial posts and C. A. Gopala Iyer was the Branch Manager of Mohanrams, admittedly a branch of the assessee company, engaged in weaving bed-sheets and towels. Up to 13th April, 1945, each of these seven employees was paid basic salary with the usual dearness allowance and bonus. No commission was paid to any of them. The basic salaries of these employees ranged from Rs. 100 a month and upwards. Raja Devadoss, Factory Manager, was the highest paid employee, and his basic salary was Rs. 306 a month.

On 13th April, 1945, the assessee company entered into agreements with each of these seven employees, which provided for the payment in addition of a commission on the net profits of the company. Three of them, the Factory Manager, the Office Manager and the Joint Office Manager, were allowed 2½ per cent. each. The Sales Manager got 1½ per cent. ; the two Assistant Managers were allowed 1 per cent. each. Gopala Iyer, the Branch Manager of Mohanrams, was allowed 10 per cent. but that was calculated not on the net profits of the company as a whole but only on the net profits of the branch. The details of the salary, dearness allowance, bonus and commission paid to each of these seven employees in the three relevant assessment years were set out in the statement of the case submitted by the Tribunal.

The genuineness of the payments in the three relevant accounting years was not disputed. The employees were assessed to tax on the basis of those payments. The Income-tax Officer was of the view, that the agreements between each of these employees and the Madura Knitting Company were not genuine. The Assistant Commissioner recorded :

> "I agree with the Income-tax officer that the manner in which the agreements have been obtained from the employees is suspicious and in any case the agreements do not conclude the matter ".

The Tribunal did not record any specific finding on the issue, whether the agreements themselves were genuine or not in the sense whether they were entered into on 13th April, 1945. But as the Assistant Commissioner pointed out whether the agreement were executed on 13th April, 1945, may not be material when the genuineness of the payments to each of these employees in each of the three relevant accounting years was not in dispute. No doubt, the Income-tax Officer recorded :

> " . . . . . . there are grounds to suspect that the alleged agreements are not genuine and they were got up long after the profits of the firm were ascertained ".

But that left untouched the genuineness of the payments themselves.

The assessee claimed these amounts paid to the employees as deductions under section 10 (2) (*x*) of the Income-tax Act. Section 10 (2) (*x*) runs :

> " Any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him on profits or dividend if it had not been paid as bonus or commission ;

> Provided that the amount of the bonus or commission is of a reasonable amount with reference to—
>
> (*a*) the pay of the employee and the conditions of his service ;
>
> (*b*) the profits of the business, profession or vocation for the year in question ; and
>
> (*c*) the general practice in similar business, professions or vocations ".

The Tribunal upheld the decision of the Departmental authorities, who disallowed the assessee's claim. The final conclusion of the Tribunal as recorded in its order on appeal was :

> " We have said enough to show that this does not satisfy clause (*a*) of the proviso. We have not also been shown that there was a general practice in similar business during those years of account. In the absence of this we are afraid that neither condition (*a*) nor condition (*c*), let alone condition (*b*) is satisfied. We, therefore, disallow the entire commission ".

It should be taken as well-settled now that when a claim is preferred by an employer under section 10 (2) (*x*) of the Act, the reasonableness or otherwise of the payment to an employee is to be judged not with reference to any subjective standards of the assessing authority but which reference to commercial expediency, and with specific reference to the factors listed in clauses (*a*), (*b*) and (*c*) of the proviso to section 10 (2) (*x*).

The Tribunal was right in pointing out that item (*c*) did not apply. There was no evidence of any general practice in businesses similar to the one in which the Madura Knitting Company was engaged. That left items (*a*) and (*b*) of the proviso to section 10 (2) (*x*) for consideration.

The Tribunal recorded in its order on appeal :

> " In the case on hand, the employees were remunerated by way of commission at rates varying from 1 to 2½ per cent. of net profits of the Company. It might be noted that it is on the net profits of the company and is not based either on production or the services rendered. It was mentioned that this commission was given as a sort of incentive to the employees to produce more goods so that the company's profits might increase. These were already remunerated by way of salary, dearness allowance, Deepavali allowance and annual bonus, etc. The commission on net profits is a new feature introduced into the accounts for the first time in these assessment years ".

That was a correct summary of facts. The Tribunal went on to observe :

> " This is an odd contract. We fail to see the connection between the efforts put in by these particular employees and the net profits. As is well-known the net profit does not depend upon production alone and depends upon several circumstances, notably market conditions, political conditions, use of machinery, presence or absence of competition, availability of raw materials and machinery parts, and facilities of distribution, sagacity in buying, selling and not the least of all, the management. Thus, in our opinion, there can be no tie between the efforts put in by these employees and the net profits ".

We are constrained to point out that this line of reasoning ignored the specific statutory provision in clause (*b*) of the proviso to section 10 (2) (x) of the Act. When the Legislature in its wisdom correlated the payments to the profits and prescribed that as one of the test to decide whether the payments were reasonable, it was certainly not for the Tribunal to disregard that. No doubt what item (*b*) refers to is " profits ". Obviously net profits would not be excluded by the statutory provision. That other factors entered into the making of the net profits certainly would not make net profits of the company an irrelevant factor in deciding whether the payments made to the employees were reasonable. It was thus a very relevant factor that the Tribunal excluded.

In the passage we have extracted above the Tribunal referred to the contention of the assessee that the grant of the commission was an incentive to the employees to produce more goods, so that the company's profits might increase. The Tribunal did not really deal with the question, whether in addition to the salaries, dearness allowance, bonus, etc., an additional incentive was in fact provided by the agreements to pay commissions to the employees. Learned counsel for the assessee repeated his contention, which apparently had been urged before the Tribunal that in the relevant accounting years those who held managerial posts as well as labourers had to work under difficult conditions. The company naturally wanted to make the most of the boom in the market subsequent to 1944 by increasing its production. In Annexure E to the statement of the case in R.C. No. 97 of 1953 were furnished figures of the quantity of banians, one of the items produced, by the Madura Knitting Company, sold between 1942 and 1946. During the accounting year ending 12th April, 1944, the sale had shrunk to 84,679 dozens. In 1944-45 the sales increased to 1,89,475 dozens ; in the next year the sales increased to 2,31,235 dozens. The increase in sales of this one item alone certainly proved a large increase in production. Yet the Assistant Commissioner, with reference to the assessment year 1946-47, corresponding account year having ended with 12th April, 1945, remarked :

> " There are no new circumstances, no increase in the volume of business as compared to the previous year ".

That was not quite correct. The production did show a marked increase. That was decided by the Tribunal itself in connection with a different claim made by the assessee. In the tabular statement at page 53 of the typed papers in R.C. No. 93 of 1955, that is, the judgment on appeal by the appellate Tribunal, the Tribunal referred to the increase in production, the unit being a dozen. In the assessment year 1942-43, it was 88,000; 1943-44, 86,600. Then there was a progressive increase, 1,34,000 in 1944-45, 1,74,000 in 1945-46; 2,32,000 in 1946-47; 2,24,000 in 1947-48 and 2,52,000 in 1948-49. This again, apparently referred only to banians. But even there, the increase in production was substantial. Earlier in its judgment the Tribunal allowed another claim of the assessee, though only in part, towards the cost of erecting temporary structures, sheds, both in the premises of the Madura Knitting Company and in Mohanrams, for coping with the increase in production. 75 per cent. of that cost was allowed in relation to Madura Knitting Company and 50 per cent. for Mohanrams. That certainly substantiated the claim of the assessee, that temporary structures had to be put up for coping with the increase of production and that made conditions in the factory not very easy. These very relevant factors the Tribunal appears to have completely overlooked in deciding whether the established increase in production under factory conditions which were by no means easy could sustain the claim of the assessee that it was a reasonable agreement it entered into with its employees in charge of production and sales, to grant them a commission based upon the net profits as an incentive to keep up the sustained increase in production.

The Tribunal was no doubt right in referring to the details of pay, dearness allowance and bonus these seven employees were paid. Those were certainly factors to be taken into account under sub-clause (*a*) of the proviso to section 10 (2) (*x*) of the Act. But then that was not the only factor the Tribunal had to take into account. The basic pay was left untouched in the relevant accounting years What the Tribunal failed to consider was whether a prudent business man faced with the problem the assessee company had to face, would have raised the basic salaries as an alternative to grant of commissions correlated to the net profits, the hoped for increase in profits being to a large extent dependent on the capacity and willingness to increase production, to take full advantage of the temporary boom.

Judged, by the test prescribed by sub-clauses (*a*) and (*b*) of the proviso to section 10 (2) (*x*), and judged from the only point of view, commercial expediency, the claim of the assessee that the payments were reasonable, was well established. There was really no basis at all for the conclusion of the Tribunal, that the commissions were unreasonable.

The answer to the 4th question in R.C. No. 93 of 1955 is in the affirmative and in favour of the assessee.

The relevant part of the second question R C No 97 of 1953, which dealt with the payments to these employees for the chargeable account period ending with 31st March, 1946, is answered in the negative and in favour of the assessee.

We shall next deal with the deductions claimed by the assessee company on the basis of the payments claimed to have been made to three of their selling agents, V.S.N. Krishnaram, Kamadenu & Co. and Sekhar & Co. Questions 1 and 2 in R.C. No. 97 of 1953 are really merged in questions 1 and 2 in R.C. No. 93 of 1955, which dealt with all the four assessment years, with which we are now concerned.

The assessee's case was that it had large stocks on hand and sales were low up to 1944. Subsequently, even in the boom period they had to face keen competition from other manufacturers of hosiery goods. The assessee company decided to appoint agents for canvassing orders for the goods produced by it.

On 7th April, 1944 they appointed Kamadenu & Co., as its agents for promoting sales of its goods within the City of Madras. Kamadenu & Co. was offered a commission of 6¼ per cent. Rajagopala Iyer and Narasimha Iyer were the partners of Kamadenu & Co. They were also partners of the Royal Talkies Distributors, a concern with which the Madura Knitting Company had no real connection. But the three N.M.R. brothers were partners both in the Madura Knitting Company and the Royal Talkie Distributors. Kamadenu & Co. purported to have an office at Madras. But that was in the premisses which belonge to the Colours Trading Company.

On 14th April, 1944 the Madura Knitting Company entered into an agreement with Sekhar & Co., Madurai, by which Sekhar & Co. was appointed as agents for the distribution and sale of the assessee's products in all parts of India except the Presidency of Bombay and South India. Sekhar & Co. also was offered a commission of 6¼ per cent. The partners of Sekhar & Co. were Chandrasekhara Iyer and Venkatachalapathi Iyer, who were related to N.M.R. Venkatakrishna Iyer.

On 17th August, 1944, the Madura Knitting Company wrote a letter to V.S. N. Krishnaram, confirming the previous oral agreement between them. Krishnaram was appointed as a canvassing agent for areas south of Madurai with a commission of 2½ per cent.

The details of the payment made by the Madurai Knitting Company to Kamadenu & Co., Sekhar & Co., and Krishnaram in the relevant years of assessment 1944-46 to 48-49 were set out at page 7 of the typed papers in the statement of the case submitted by the Tribunal in R.C. No. 93 of 1955.

Deduction of these payments was claimed by the assessee company under section 10 (2) (*xv*) of the Income-tax Act. The relevant portion of section 10 (2) (*xv*) runs :

> "any expenditure. . . . . laid out or expended wholly and exclusively for the purpose of such business".

To attract the application of the statutory provision in section 10 (2) (*xv*) two factors at least had first to be proved by assessee in this case.

(i) that the amount had been expended by the assessee ; and (ii) that the payments had been made for services rendered to the assessee company. That was the specific case the assessee put forward for acceptance. After establishing both these factors the assessee had still to satisfy the test prescribed by section 10 (2) (*xv*), that that the expenditure had been incurred wholly and exclusively for the purpose of its business. In considering whether that test was satisfied, the view point should have been commercial expediency. But if either of the preliminary factors had not been proved, that is, if no payment had been made at all or if a payment was made which was not correlated to any services rendered to the assessee, the question of deciding whether commercial expediency would sanction the claim, that the money had been expended wholly and exclusively for the business of the company could not arise at all for consideration.

The claim of the assessee was with reference to the payments made to three different groups of persons, and the payments were made in each of the four years now under consideration. Each claim for each year had necessarily to be investigated separately. There was a full discussion in the orders of the Income-tax

Officer, the Appellate Assistant Commissioner and the Appellate Tribunal with reference to the assessment year 1945-46. We shall first deal with those findings.

With reference to V.S.M. Krishnaram, the Income-tax officer pointed out that Krishnaram was a whole time employee who devoted his entire time to the work of the Colours Trading Company. The finding of the Income-tax Officer was :

> " Since Mr. Krishnaram happens to be a close relative of the Managing Partners, the payment to him appears to have been made more out of love and affection than for services rendered."

With reference to Kamadhenu & Co., the finding of the Income-tax Officer was even more specific :

> " . . . . . . actually it is seen that no services of any kind have been rendered by Kamadhenu & Co."

Dealing with Sekhar & Co., the Income-tax Officer recorded :

> " Thus from all the evidence available it is clear that no business is canvassed by Sekhar & Co. and the business shown to have been done in the name of Sekhar & Co. was only business canvassed by the assessee's employees ".

Thus, the Income-tax Officer found that none of the three selling agents, Krishnaram, Kamadhenu & Co, and Sekhar & Co, rendered any services to the assessee company during the relevant accounting year 1944-1945.

The Assistant Commissioner was further of the view, that the payments to Krishnaram and Sekhar & Co. were not genuine. The Tribunal, however, did not record any specific finding on the issue, whether the payments pleaded by the assessee company in the four relevant accounting years were genuine or not.

On the question whether these three selling agents rendered any services in the relevant accounting year 1944-1945, the Tribunal agreed with the Income-tax officer. With reference to Krishnaram the finding of the Tribunal was :

> " The orders for purchase came directly from the constituents and not through Krishnaram and no evidence is on record that Krishnaram worked up this field and it was through his efforts that these orders came ".

With reference to Kamadhenu & Co., the Tribunal found :

> " In fact there is nothing on record to show that these persons did any work. On the other hand, there is enough evidence on record to show that the stockists mentioned earlier dealt directly with the Madura Knitting Co., and they were always getting supplies directly, payments also being made directly ".

The assessee claimed that Sekhar & Co. had an office in Calcutta. Sekhar & Co. had its headquarters at Madurai. The Tribunal found that Sekhar & Co. had no office in Calcutta. The Tribunal further pointed out that though the agreement with Sekhar & Co. provided for commission on sales effected virtually throughout Northern India, the commissions were confined only to sales effected in Calcutta. With reference to those sales the Tribunal was of the view, that it was the assessee's branch at Calcutta that did all the work : Virtually most of the sales were to two constituents of the company at Calcutta.

As we pointed out, while the Assistant Commissioner doubted the genuineness of payments to Krishnaram and Sekhar & Co. the Tribunal did not go into that question. It apparently assumed without deciding it that the payments were genuine. The Tribunal recorded :

> " Our finding is that, apart from the question whether the payments were genuinely made or not, these were not expended wholly and exclusively for the purpose of the business........"

The finding of fact recorded by the Tribunal, that none of the three selling agents Kamadhenu & Co., Sekhar & Co. and Krishnaram rendered any services under their respective contracts to the assessee company in the relevant account year 1944-45, to justify any payment to them, should suffice to reject the claim of the assessee company to a deduction under section 10 (2) (*xv*) of the Act. It is on that narrow basis that we are content to rest our decision.

The Tribunal also took other factors into account in deciding whether the amounts could be claimed to have been expended wholly and exclusively for the business of the assessee company. It is really not necessary for us to discuss these features. No doubt it was proved that the amounts paid to Sekhar & Co., and Kamadhenu & Co., were eventually credited to their accounts with the Colours Trading Company. But then the Colours Trading Company was something quite independent of the Madura Knitting Company. The Tribunal was also of the view, that there was no need in 1944 to appoint any selling agents. The question of need had to be decided with reference to commercial expediency. But that does not appear to have been adopted as the view point by the Tribunal. But as we said, it is not necessary to dwell upon these features of the order of the Tribunal. When the assessee failed to prove that the payments it claimed it had made in the relevant account years, were for services actually rendered to the assessee company by the selling agents, there was no need to examine anything else to reject the claim of the assessee founded on section 10 (2) (*xv*) of the Act.

Though the findings we have referred to above were with specific reference to the assessment year 1945-46, the learned counsel for the assessee admitted that the position was not in any way different in the three succeeding assessment years. If at least the assessee had offered to place before us further evidence with reference to the assessment years which succeeded 1945-1946, to prove that in those years the selling agents had rendered services, we could have examined the need to call for a better statement of the case from the Tribunal. That need did not arise. No such evidence was placed before us. It was assumed all through that the position in relation to the assessment years 1946-1947, 1947-1948 and 1948-1949 was the same as in relation to 1945-1946. There was apparently no evidence which the assessee would produce, that in the three succeeding years any or all the three selling agents did render services to the assessee company. Learned counsel for the assessee urged that the disallowance of the claim under this head for the four assessment years in question should not in any way prejudice the claim of the assessee if one were to be made in the assessment years subsequent to 1948-1949. As we have pointed out, the claim with reference to each item of expenditure has to be examined with reference to each assessment year, and with reference to the evidence made available for such an assessment.

We have discussed the question so far with reference to the requirements of section 10 (2) (*xv*) of the Income-tax Act. The claim under Excess Profits Tax has to be decided with reference to the provisions of rule 12 of Schedule I of that Act. A contention was urged before the Tribunal, that if the requirements of section 10 (2) (*xv*) were satisfied, that should suffice to uphold the claim under rule 12 of Schedule I of the Excess Profits Tax That question does not really arise for determination, because we have held that the requirements of section 10 (2) (*xv*) of the Income-tax Act have not been satisfied. Even if payments were made, if those payments were not correlated to any services rendered by the recipients, no question of deduction either under section 10 (2) (*xv*) of the Income-tax Act or rule 12 of Schedule I of the Excess Profits Tax Act can arise for further consideration in view of the case put forward by the assessee.

Our answer to question No. 1 and that part of question No. 2 which referred to Krishnaram, Kamadhenu & Co., and Sekhar & Co., in R.C. No. 97 of 1953 is against the assessee. Similarly, our answer to questions 1 and 2 in R C. No. 93 of 1955 is also against the assessee.

Since neither side has wholly succeeded in its contentions, we direct that there be no order as to costs in either of the two references.

P.R.N. *References answered.*

[END OF VOLUME, (1957) I M.L.J. REPORTS.]

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THE

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REPORTS.

(The Supreme Court.)

I] JANUARY [1957

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, T. L. VENKATARAMA AYYAR AND S. J. IMAM, JJ.

Sree Meenakshi Mills, Limited, Madurai .. *Appellant**

v.

The Commissioner of Income-tax, Madras .. *Respondent*.

Income-tax Act (XI of 1922), section 66—Decision of Tribunal—When open to reference to Court under section 66.

The position that emerges from the authorities may thus be summed up :

(1) When the point for determination is a pure question of law such as construction of a statute or a document of title, the decision of the Tribunal is open to reference to the Court under section 66 (1) of the Income-tax Act.

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

(3) A finding on a question of fact is open to attack under section 66 (1) as erroneous in law when there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

The issues whether the sales entered in the books of the assessee in the names of "intermediaries" were genuine and if not, to whom the goods were sold and for what price are all questions of fact. Their determination does not involve the application of legal principles to facts established in the evidence. Where the findings of the Tribunal are amply supported by evidence and are eminently reasonable, there is no question which could be referred to the Court under section 66 (1).

Sections 42 (1) and 42 (3) of the Income-tax Act applies both to residents and non-residents. The fixation of the rate of profits in respect of profits made by sale of goods manufactured in British India and sold in the Native States (before Independence) is a pure question of fact, and is not open to reference under section 66 (1).

Appeals by special leave from the judgment and order dated the 10th day of March, 1952 of the Madras High Court in C.M.P. Nos. 10427, 10425 and 10426 of 1951 arising out of the order dated the 23rd day of February, 1951 of the Income-tax Appellate Tribunal, Madras Bench in Reference Application Nos. 312, 310 and 311 of 1950-51.

P. R. Das and *B. Sen*, Senior Advocates (*V. Sethuraman* and *S. Subramanian*, Advocates, with them) for the Appellant.

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* Civil Appeals Nos. 124 to 126 of 1954. 26th September, 1956.

C. K. Daphtary, Solicitor-General for India (*Porus A. Mehta* and *R. H. Dhebar* for *P. G. Gokhale*, Advocates with him) for the Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—These appeals arise out of orders of assessment made on the appellant by the Appellate Tribunal, Madras Bench, for the years of account 1941-42, 1942-43 and 1943-44. The appellant applied under section 66 (1) of the Indian Income-tax Act (hereinafter referred to as the Act) to refer to the High Court certain questions which according to it arose out of the orders; but the Tribunal rejected the applications. The appellant then moved the High Court under section 66 (2) of the Act for an order requiring the Tribunal to refer those questions to the Court, but the learned Judges held that the questions on which reference was sought by the appellant were pure questions of fact, and dismissed the applications. The matter now comes before us by way of special appeal.

The facts material for the purpose of these appeals may shortly be stated. The assessee is a public company registered under the Indian Companies Act, and its Managing Agents are the firm of Messrs. K. R. Thyagaraja Chettiar and Company, whose partners are Mr. Thyagaraja Chettiar and his two sons. The company is resident and ordinarily resident in British India, its head office being at Madurai in the Madras State. It carries on business in the manufacture and sale of yarn, and for the purpose of that business it purchases cotton and occasionally sells it. Its profitss arise for the most part from the sale of yarn and to some extent from the re-sale of cotton. According to the account books of the company, its profits from business for the account year 1941-42 were Rs. 9,25,364, for 1942-43 Rs. 24,09,832, and for 1943-44 Rs. 29,13,881. In its returns, the appellant showed these amounts as its income chargeable to tax for the respective years. The Department did not accept the correctness of the figures as shown in the accounts. It contended that the company had earned more profits than were disclosed in its accounts, and that it had contrived to suppress them by resort to certain devices. According to the Department, the scheme evolved by the appellant for this purpose was this: Suppose the Company sold 25 bales of yarn to *X* for Rs. 50,000 at the then market rate and received the full amount of the price. The books of the Company would show neither the sale to *X* nor its receipt of Rs. 50,000. Instead, there will be an entry in its books showing the sale of these very bales to *A* for Rs. 20,000 which will be about the cost price and in the books of *A* these goods will be shown as sold by it to *X* for Rs. 50,000. If the sale by the company to *A* and the connected sale by *A* to *X* were genuine, the Company would have made no profit on the sale, whereas *A* would have made a profit of Rs. 30,000 on it. But, in fact, both these sales were sham transactions; the only sale that took place was that by the Company to *X* and the price actually received by it was not Rs. 20,000 but Rs. 50,000. As a result of these paper transactions and manipulations, the profit of Rs. 30,000 made by the Company was suppressed. This process was reversed when the Company purchased cotton. The appellant purchased, let us say, 100 bales of cotton from *X* for price of Rs. 5,000, and paid that amount to *X*. Neither this purchase from *X* nor the payment of Rs. 5,000 to him would appear in the books of the Company. Instead, the books of *A* will show these goods as purchased by it from *X* for Rs. 5,000, and the books of the appellant will show a purchase from *A* of those very goods for Rs. 8,000. Both these sales were fictitious, the only real transaction was the sale by *X* to the Company and the price actually paid therefor by the Company was only Rs. 5,000. By the device of sale by *X* to *A* and by *A* to the Company, the cost price had been inflated by Rs. 3,000, and the real profit had been concealed to that extent. The accounts of the Company, therefore, did not reflect the true position as to the profits actually made by the appellant. The names of the intermediaries who according to the Department played the role of *A* in the above illustration—and they will hereafter be referred to simply as intermediaries—are given below with the amount of profits made on the sale of yarn in their names and concealed, or the extent of the cost price inflated on the purchase of cotton from them, as found by the Tribunal:

			Rs.
1941-42			
1.	Meenakshi and Co.	.. Sale of yarn	.. 35,830
2.	Sivagami and Co.	.. do.	.. 35,443
3.	Mangayarkarasi and Co.	.. do.	.. 34,579
4.	Alagu and Co.	.. Purchase of cotton	.. 34,003
1942-43			
1.	Meenakshi and Co.	.. Sale of yarn	.. 53,635
2.	Sivagami and Co.	.. do.	.. 58,103
3.	Rukmani and Co. Ltd.	.. do.	.. } 3,97,467
4.	Sivagami and Co. Ltd.	.. do.	.. }
5.	Rukmani and Co. Ltd.	.. Purchase of cotton	.. 33,533
1943-44			
1.	Pudukottah and Co. Ltd.	.. Sale of yarn	.. 18,99,488
2.	Do.	.. Purchase of cotton	.. 12,703
3.	Rukmani and Co. Ltd.	.. do.	.. 22,504
4.	Rajendra Ltd.	.. Sale of yarn	.. 1,06,486

The contention of the Department was that the amounts shown as profits made by the intermediaries and mentioned above represented in fact the profits actually earned by the appellant, and that they should be added to the figures shown in its accounts as its profits. The appellant contested this position, and maintained that the state of affairs disclosed by its accounts was true, that its sales in favour of the intermediaries were genuine, and that, in fact, little or no profits were made by it in those transactions, that it purchased cotton only from the intermediaries and did pay them the amounts as shown in the accounts. These contentions were closely examined by the Income-tax Officer in the first instance, then again by the Appellate Assistant Commissioner on appeal, and finally by the Appellate Tribunal, and on an elaborate consideration of the materials placed before them, they held that the following facts were established:

1. Tht sale of yarn by the appellant to the intermediaries mentioned above was for a price very much below the market rate, often for the cost price and some times for even less. No acceptable explanation had been given for this unusual feature. The yarn was in that period a scarce commodity, and it was a seller's market. The amounts lost by the Company on these transactions during the three years, if they were genuine, would far exceed Rs. 25 lakhs. The sales therefore were not *bona fide*.

2. The firms of Meenakshi and Company, Sivagami and Company, Mangayarkarasi and Company, and Alagu and Company, who were the intermediaries for the year 1941-42 were all newly started for the first time in 1941. The partners of the firm were men of no means, and were all relations of Mr. Thyagaraja Chettiar, the chief partner of the Managing Agents firm and a dominant figure in charge of the Company's affairs. None of them had done any business in yarn before. The personnel of these firms was drawn in different combinations from a group of half a dozen persons who were all the creatures of Mr. Thyagaraja Chettiar.

3. During the year 1942-43, two of the firms, Mangayarkarasi and Company, and Alagu and Company, were closed, and their place was taken by

two private limited companies called Rukmani and Company, Limited and Sivagami and Company, Limited. The shareholders of these companies were again drawn from the small group of persons who were partners of the firms, and they were all Mr. Thyagaraja Chettiar's men. These companies declared no dividends, even though they made considerable profits and the share-holders received no dividends nor even statements of accounts. In truth, they had no beneficial interest in the concerns.

4. The business of the intermediaries, both firms and the companies, consisted solely in the purchase of yarn from the appellant and not from any other person, and the entirety of the yarn purchased was sold by them *en bloc* to constituents of the appellant. Thus, the business of the intermediaries was, in fact, only a part of the business carried on by the appellant.

5. The sales by the appellant in favour of these intermediaries were of large quantities of yarn and sometimes on a scale far higher than other genuine commercial transactions. as for example, the sale of 1850 bales on 17th April 1942 to Rukmani and Company. No securities were taken from the intermediaries for this transaction. Having regard to the magnitude of the business, the capital of the intermediaries even on paper was negligible.

6. The intermediaries had, most of them no offices of their own. Even when they had offices, these were arranged by the officers of the appellant. The concerns had no godowns, and their staff was meagre and recruited from the employees and servants of the appellant. Apart from signing the contracts, the intermediaries did nothing.

7. The profits earned by the firms were shown in their books as cash in their possession, but on a surprise raid the authorities were unable to discover any cash with them. The amount shown as profits in their accounts was, in fact, in the possession of the appellant Company.

8. The intermediaries had, in fact, never to pay to the appellant for any of the purchases made by them, the course of the business being that they sold the goods purchased from the appellant to its old customers, who paid therefor.

9. The intermediaries did not issue any delivery orders on the appellant in favour of the customers to whom they ostensibly sold the goods, but the goods were despatched directly by the appellant to the customers and delivered to them.

10. The customers to whom the goods were delivered by the appellant as aforesaid paid the full price for which they purchased them from the intermediary firms, not to those firms with whom alone they had privity of contract but to the appellant direct; and these payments appear as receipts in the books of the appellant.

11. After the Limited Companies were started in 1942-43 and 1943-44 the course of business adopted by the appellant showed a further mystification. There was firstly a sale of certain quantity of yarn by the appellant to company *A*, which sold it in turn to company *B* which in turn sold it to *C* which ultimately sold it to the usual customers of the appellant. In spite of the number of links between the appellant and the customers, the goods were directly despatched by the former to the latter, who paid by cheques the full amount due by them to their seller *C*, who straightaway endorsed them in favour of the appellant. The intermediaries *A* and *B* did no act, and took no part in the ultimate payment of the price by the purchasers.

12. Some of the intermediaries, firms and companies had been formed in Pudukottah State. At that time, that State was foreign territory, and

the profit earned there would become taxable only if it was remitted to British India. Pudukottah is neither a cotton producing area, nor was a market for cotton there. The object with which the intermediaries had been set up in Pudukottah was obviously to screen portions of the profit earned by the appellant.

On these facts, the Tribunal came to the conclusion that the contentions of the Department had been fully established, namely, that the intermediaries were dummies brought into existence by the appellant for concealing its profits that the sales standing in their names were sham and fictitious, and that the profits ostensibly earned by them on those transactions were, in fact earned by the appellant, and should be added to the amounts shown as profits in its accounts. The point for decision is whether there arises out of the order of the Tribunal any question which can be the subject of reference under section 66 (1) of the Act. Under that section, it is only a question of law that can be referred for decision of the Court, and it is impossible to argue that the conclusion of the Tribunal is anything but one of fact. It has been held on the corresponding provisions in the English Income-tax statutes that a finding on a question of fact is open to attack as erroneous in law only if it is not supported by any evidence, or if it is unreasonable and perverse, but that, where there is evidence to consider, the decision of the Tribunal is final even though the Court might not, on the materials, have come to the same conclusion if it had the power to substitute its own judgment. In *Great Western Railway Co.* v. *Bater*[1], Lord Atkinson observed:

> "Their (Commissioners') determinations of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come ; and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs".

There is no need to further elaborate this position, because the law as laid down in these observations is well-settled, and has been adopted in the construction of section 66 of the Act. Now, the determination of the Tribunal in the present proceedings being one of fact, it is open to review by the Court only on the ground that it is not supported by any evidence or that it is perverse. The appellant understood this position quite correctly, and in its application under section 66 (1) it stated the only question which it wanted the Tribunal to refer to the Court with reference to the present controversy in the following terms:

> "Whether on the facts and in the circumstances of the case *there is any legal evidence to support the finding* that the four firms, Meenakshi and Co., Sivagami and Co., Mangayarkarasi and Co., and Alagu and Co., were benamidars for the appellant and that the profits made by these firms were profits made by the appellant."

This was for the accounting year 1941-42. The question was similarly worded for the subsequent years also except that the names of the intermediaries were different for the different years. The question as framed assumes, it will be noted, that the Tribunal had held that the intermediaries were benamidars for the appellant, and on this assumption were grounded several contentions which were pressed on behalf of the appellant. Whether this assumption and the contentions based thereon are well-founded is a different matter, and will be considered in due course. But apart from that, it will be seen that the only ground of attack which was directed against the finding of the Tribunal was that there was no legal evidence. This is of course a contention open to the appellant; but has that been substantiated? Mr. P. R. Das, learned counsel for the appellant, did, at the start, put his contention as high as that. But it became abundantly clear when his argument began to unfold itself that it amounted to no more than this that the conclusion drawn by the Tribunal from the facts found by it was unsound and erroneous. He did not, it must be stated, dispute the facts themselves, but he took them one after another, and contended that they were susceptible of inferences other than those drawn by the Tribunal. He next offered explanations for them which would make them consistent with the contention of the appellant. And he finally wound up by saying that the conclusion reached by the Tribunal was not justified. This clearly is an erroneous approach to the whole question. When a conclusion has been reached on an appreciation of a number of facts established by the evidence, whether that is sound or not must be determined not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting in the picture as a whole. In *Edwards* (*Inspector of Taxes*) v. *Bairstow*[1], Lord Radcliffe stated:

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[1] (1922) 8 T.C. 231, 244.

> " . . . . I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

This furnishes the corrective to the course adopted by counsel for the appellant in his argument.

And a more serious objection to it, and one of substance is that it relates merely to matters of appreciation of evidence, and does not support the position that there is no legal evidence in support of the finding of the Tribunal. For example, one of the facts on which the Tribunal relied for its conclusion was that the partners of the intermediary firms were new to yarn business and came on the scene for the first time in 1941. The appellant contends that no significance could be attached to this, as the partners belonged to the Nattukkottai Chetti caste, which was a trading community. But surely this does not render the evidence irrelevant or inadmissible. It only affects the weight to be attached to it. Then again, the Tribunal has made a point of it that the goods were sold by the appellant to the intermediaries for a price far below the market price, sometimes even below the cost price. The answer of the appellant to this was that they were forward contracts and that the price of yarn on the dates of those contracts was low. But the Tribunal declined to accept this explanation for the reason—and that, a good one—that there were no contract registers from which the dates on which the contracts were entered into could be verified, and that the contract notes themselves were not serially numbered. If this is not a matter of pure appreciation of evidence, it is difficult to see what else is. The Tribunal also referred to the fact that the only business which the intermediaries did was to purchase yarn from the appellant and sell it to its own constituents. The answer of the appellant to this was that there was no need for the intermediaries to purchase from other manufacturers when all their needs were met by the appellant and that there was nothing unusual in their selling all their yarn to its customers. It is unnecessary to say anything about the worth of this contention, for that is a matter exclusively for the Tribunal to assess. What has now to be considered is whether this circumstance on which the Tribunal relied is or is not cogent evidence in support of its conclusion. It will be preposterous to contend that it is not. No useful purpose will be served by examining the contentions of the appellant with reference to the other facts on which the Tribunal relied for its conclusion. They are of the same pattern as the above, and bear, at their best, on the weight to be attached to the facts and not to their relevancy or admissibility, and there is no question of want of legal evidence in support of the conclusion of the Tribunal.

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[1] (1955) 28 I.T.R. 579.

Reference should also be made in this connection to another contention which was pressed by Mr. P. R. Das at a later stage of the argument. He contended that the facts found showed that the intermediaries were benamidars not for the appellant but for Mr. Thyagaraja Chettiar of the Managing Agents firm. The significance of this contention lies in this that it grants—and Mr. P. R. Das was quite frank about it—that the facts found did point to the fact that the intermediaries were dummies, leaving outstanding for decision only the question whether on the evidence they were benamidars for the appellant or for Mr. Thyagaraja Chettiar. That is a question which will be separately considered. But it is manifest that this argument is destructive of the contention of the appellant that there is no legal evidence to support the conclusion of the Tribunal that the intermediaries were mere dummies. The result then is that the finding of the Tribunal viewed as one of fact, which in truth it is, is supported by evidence, and is not unreasonable and is not open to attack on any of the grounds on which such a finding could be assailed in reference under section 66 (1).

It was next contended for the appellant that inference from facts was a question of law, and that as the conclusion of the Tribunal that the intermediaries were dummies and that the sales standing in their names were sham and fictitious was itself an inference from several basic facts found by it, it was a question of law and that the appellant had the right under section 66 (1) to have the decision of the Court on its correctness, and support for this position was sought from certain observations in *Edwards (Inspector of Taxes)* v. *Bairstow*[1], *Bomford* v. *Osborne*[2], *Thomas Fattorini (Lancashire) Ltd.* v. *Commissioners of Inland Revenue*[3], *Cameron* v. *Prendergast*[4] and *The Gramaphone and Typewriter Ltd.* v. *Stanley*[5]. At the first blush, it does sound somewhat of a contradiction to speak of a finding of fact as one of law even when that finding is an inference from other facts, the accepted notion being that questions of law and of fact form antithesis to each other with spheres distinct and separate. When the Legislature in terms restricts the power of the Court to review decisions of Tribunals to questions of law, it obviously intends to shut out questions of fact from its jurisdiction. If the contention of the appellant is correct, then a finding of fact must, when it is an inference from other facts, be open to consideration not only on the ground that it is not supported by evidence or perverse but also on the ground that it is not a proper conclusion to come to on the facts. In other words, the jurisdiction in such cases is in the nature of a regular appeal on the correctness of the finding. And as a contested assessment—and it is only such that will come up before the Tribunal under section 33 of the Act, must involve disputed questions of fact, the determination of which must ultimately depend on findings on various preliminary or evidentiary facts, it must result that practically all orders of assessment of the Tribunal could be brought up for review before Courts. That will, in effect, be to wipe out the distinction between questions of law and questions of fact and to defeat the policy underlying sections 66 (1) and 66 (2). One should hesitate to accept a contention which leads to consequences so startling, unless there are compelling reasons therefor. Far from that being the case, both principle and authority are clearly adverse to it.

Considering the question on principle, when there is a question of fact to be determined it would usually be necessary first to decide disputed facts of a subsidiary or evidentiary character, and the ultimate conclusion will depend on an appreciation of these facts. Can it be said that a conclusion of fact, pure and simple, ceases to be that when it is in turn a deduction from other facts? What can be the principle on which a question of fact becomes transformed into a question of law when it involves an inference from basic facts? To take an illustration, let us suppose that in a suit on a promissory note the defence taken is one of denial of execution. The Court finds that the disputed signature is unlike the admitted signatures of the defendant. It also finds that the attesting witnesses who speak to execution were not, in fact present at the time of the alleged execution. On a consideration of these facts the Court comes to the conclusion that the promissory note is not genuine. Here there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact. Can it be contended that the finding that the promissory note is not genuine is one of law, as it is an inference from the primary facts found? Clearly not. But it is argued against this conclusion that it conflicts with the view expressed in several English decisions, some of them of the highest authority, that it is a question of law what inference is to be drawn from facts. The fallacy underlying this contention is that it fails to take into account the distinction which exists between a pure question of fact and a mixed question of law and fact, and that the observations relied on have reference to the latter and not to the former, which is what we are concerned with in this case.

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[1] (1955) 28 I.T.R. 579.

[2] L.R. (1942) A.C. 14: 1942 I.T.R. Supplt. 27.

[3] L.R. (1942) A.C. 643 : 24 T.C. 328.

[4] L.R. (1910) A.C. 549 : 8 I.T.R. Supplt. 75.

[5] L.R. (1908) 2 K.B. 89 : 5 T.C. 358.

In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site, that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession, the Court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law. The ultimate finding on the issue must, therefore, be an inference to be drawn from the facts found, on the application of the proper principles of law, and it will be correct to say in such cases that an inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination equally with the finding or ascertainment of basic facts does not involve the application of any principle of law. The proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact. The following observations of Lord Atkinson in *Herbert* v. *Samuel Fox & Co., Ltd.*[1] clearly bring out the principle above stated:

> " . . . . . Your Lordships were pressed with the usual argument, that as the County Court judge though a judge of law and facts is the sole judge of fact his findings cannot be distur-

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[1] L.R. (1916) 1 A.C. 405, 413.

bed if there was any evidence before him upon which he as a reasonable man could find as he has found. That argument is quite sound if it be applied to pure findings of fact. It is utterly unsound if it be applied either to findings on pure questions of law or on mixed questions of law and fact . . . . It is wholly illegitimate in my view in cases such as the present, by finding in the words of the statute to endeavour to secure for a finding on a pure question of law or on a mixed question of law and fact that unassailability which properly belongs only to a finding on a question of pure fact".

These observations were made in a case under the Workmen's Compensation Act, 1904. But the same principles have been applied to revenue cases and it has consistently been held that inferences from facts may themselves be inferences of fact and not of law, and that such inferences are not open to review by the Court.

In *The Queen* v. *Special Commissioners of Income-tax*[1] Esher, M.R. observed:

> " . . . It seems to me that that is a question of fact. It is a question of the true inference which they (Commissioners) had to draw as a matter of evidence upon the facts which they had in evidence before them. But to "draw an inference of fact from evidence before you" is not a question of law at all. The inference is a question of fact just as much as the direct evidence of fact and it would be an appeal against facts which we are not entitled to entertain and consequently there can be no *Mandamus* ".

A clearer and more emphatic refutation of the appellant's contention cannot be found. The law is thus summed up in Simon's Income-Tax, 1952 Edition, Volume I, page 281:

> " There can be no doubt that it is for the Commissioners and for the Commissioners alone, to discover and state the basic or 'primary' facts of the case. . . . . . From the primary facts the Commissioners will almost always need to draw some inference or inferences by the exercise of reasoning and it is this process of inference which may, according to its nature be a finding of law or of fact, or a mixed finding of law and fact ".

The result of the authorities then is that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or mixed question of law and fact.

Is there anything in the authorities cited by the appellant which militates against this conclusion? In *Edwards (Inspectors of Taxes)* v. *Bairstow*[2], the point for determination was whether the transaction entered into by the assessee was an adventure in the nature of trade. The finding of the Commissioner was that it was not. But that was reversed by the House of Lords who held that on the facts found it was an adventure in the nature of trade. The very expression "in the nature of trade" requires that the adventure should possess certain elements which in law would invest it with the characteristics of a trade. The question is, therefore, one of mixed law and fact. That is precisely how the matter is dealt with by Lord Radcliffe. He observes at page 589:

> " My Lords, I think that it is a question of law what meaning is to be given to the words of the Income-tax Act 'trade, manufacture, adventure or concern in the nature of trade' and for that matter what constitutes 'profits or gains' arising from it. Here we have a statutory phrase involving a charge of tax and it is for the courts to interpret its meaning having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of 'income' ".

Lord Somervell agreed with the opinion expressed by Lord Radcliffe. The Lord Chancellor, dealing with this aspect of the case, referred to the decision in *Cooper* v. *Stubbs*[3] and *Jones* v. *Leeming*[4], where it had been held that whether trading activities amounted to carrying on business was a pure question of fact, and observed at page 587:

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[1] 3 Tax Cases 289, 290-291.

[2] (1955) 28 I.T.R. 579.

[3] L.R. (1925) 2 K.B. 753.

[4] L.R. (1930) A.C. 415.

> "Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or in other words, what the statutory language means".

In the view of Viscount Simonds, therefore, the question was one of mixed law and fact. But he was also prepared to decide the case on the footing that it was a question of fact and observed at pp. 585-586:

> "This appeal must be allowed and the assessments must be confirmed. For it is universally conceded that though it is a pure finding of fact it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained".

That is to say, even if the question was one of pure fact, the finding of the Commissioners was liable to be set aside on the ground that there was no evidence in support of it or that on the evidence it was perverse. What is of significance in this is that the Lord Chancellor dealing with the question whether the adventure was in the nature of trade as one of fact does not hold that the ultimate finding was one of law by reason of its being one of inference from facts but treats it only as a finding of fact and open to attack as such. This decision therefore, is no authority for the position that where a finding is given on a question of fact based upon an inference from facts, that is always a question of law, and the following observation of Lord Radcliffe at page 592 is directly against it:

> "I do not think that inferences drawn from other facts are incapable of being themselves findings of fact although there is value in the distinction between primary facts and inferences drawn from them".

In *Bomford* v. *Osborne*,[1] the Commissioners had held that 230 acres out of a plot of 550 acres belonging to the assessee should be separately assessed as "'gardens for the sale of produce'', while the remaining lands should be taxed on the basis of their annual value. The assessee disputed the correctness of this finding, and contended that the 230 acres in question were not gardens as contemplated by Rule 8 of Schedule B of the Income-tax Act, 1918. The House of Lords agreed with this contention and discharged the assessment. One of the points raised on behalf of the Crown was that the finding of the Commissioner was one of fact and was therefore final. This contention was repelled on the ground that whether the lands were gardens within rule 8 was not a pure question fact. The following observations in the speech of Lord Wright at page 38 may be quoted:

> "It has been strenously contended as a main argument on behalf of the Crown that the questions here to be discussed are questions of 'fact and degree'. But, in my opinión, the true effect of the facts found cannot be ascertained until the true construction of rule 8 has been examined and its true application to the facts ascertained. There are, in addition to incidental questions, two main questions of law, namely, what is the meaning of "gardens for the sale of the produce" and how is that meaning to be applied to an acreage which is worked as a single mixed farm in one unit".

Thus, the basis of the judgment was that the question decided by the Commissioners was one of mixed law and fact, and that their determination was open to review by the courts. There is nothing in this decision again which supports the contention of the appellant that findings on questions of fact based on inference from other facts should be regarded as questions of law. On the other hand, the following observations of Viscount Simon at page 22 are really against this contention:

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[1] L.R. (1942) A.C. 14 : 1942 I.T.R. Suppl. 27.

> "No doubt, there are many cases in which commissioners, having had proved or admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact, but in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the commissioner's conclusions".

These observations clearly establish that inferences from facts found need not necessarily be inferences of law but may be conclusions of fact, and such conclusions of fact could be attacked on grounds on which findings of fact could be attacked, namely, there is no evidence to support them as for example, if the conclusion does not follow even if all the facts found are accepted. That does not certainly support the contention of the appellant.

In *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners*,[1] the point for decision was whether the appellant company had failed to declare within a reasonable time dividend out of the profits earned by it, in which case under section 21 of the Finance Act, 1922 the income is deemed to be income of the members and chargeable to super-tax. The finding of the Board of Referees was that distribution of profits had not been made within a reasonable time, but their decision was reversed by the House of Lords on the ground that there was no evidence in support of it. Thus, there is nothing in the decision itself which has any bearing on the present controversy. The appellant, however, relies on the following observations in the speech of Lord Porter at page 667:

> "I . . . . . think that the final conclusion is not a fact but an inference from facts previously set out, and that, therefore, that conclusion is not binding upon the tribunal to which the case is referred unless it appears from the previous findings that there are facts which support it. In the present case I cannot find such support".

In the context, what these remarks mean is that when the final conclusion is one of fact and is itself an inference from other facts, it is open to attack on the ground that the basic facts themselves do not constitute evidence in support of the final conclusion—a position which does not arise here.

Then there is the observation of Lord Maugham in *Cameron* v. *Prendergast*[2] that "inferences from facts stated by the Commissioners are matters of law and can be questioned on appeal". Does this remark mean that inferences from facts found are questions of law in all cases, whether these inferences are inferences of facts or of law? There being nothing in the observation to throw any light on this question, we must examine the facts of the case to ascertain its true import. There, the assessee who had been a Director in a building company for 44 years wanted to resign his office, but he was persuaded to continue as an advisory Director on a reduced remuneration and a payment of £45,000 and this arrangement was embodied in a deed. The question was whether these amounts were taxable as profits arising from an office. The Commissioners had held that the consideration for the payments was the promise of the assessee not to resign his office, and that therefore they were not profits arising from any office. The House of Lords held, affirming the judgment of the majority of the Court of Appeal that the amounts were paid to the assessee in consideration of his continuing as a Director, and were therefore taxable. Thus, the only point for determination in the case was as to the character of the payments made to the appellant, and that depended on the true interpretation to be put on the agreement, and that really was a question of law. There was no question of the Commissioners recording findings on primary facts and then of drawing further inferences therefrom. The dictum relied on by the appellant therefore could have no reference to the question now under consideration. It is possible that having regard to the observations following the one quoted above that "the same remark is true as to the construction of documents", what was meant to be conveyed was that the legal effect of facts stated in the deed of agreement was a question of law. In the context, it is impossible to construe the observation as an authority in support of the present contention of the appellant, and it should be mentioned that there is nothing about this in the judgments of the other members of the Court.

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[1] L.R. (1942) A.C. 643 ; 24 T.C. 328.

[2] L.R. (1940) A.C. 549 ; 8 I.T.R. Supplt. 75, 81.

One other argument advanced on behalf of the appellant must now be considertd. This is based on the following observations of Cozens-Hardy, M. R. in *The Gramaphone and Typewriter Ltd.* v. *Stanley*[1]:

> " It is undoubtedly true that if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the court to say whether the evidence justified what the Commissioners held. I am satisfied that the case stated by the Commissioners falls under the latter head ".

On these observations, the argument of the appellant was that whenever the Tribunal found certain basic facts and stated its conclusions thereon, its determination was open to review by Court, and that it was immaterial whether these conclusions were of fact or of law. The answer to this contention is furnished by the decision in *The American Thread Company* v. *Joyce*[2], wherein the true scope of these observations has been fully considered and authoritatively settled. There, Hamilton, J. pointed out that what the observations meant was that if the Commissioners merely stated certain findings of fact and while expressing what according to them was their effect, did not intend that the expression should be taken as their finding thereon, then it must be taken that they had referred to the decision of the Court the question as to what inference should be drawn from the basic findings, but that if they had not merely stated the basic findings but had also stated their conclusions thereon intending that they should be their determinations on the question, then those determinations, if conclusions of fact, would be binding on the Court and that the assessee would then have been stated out of Court. Dealing with the statement of the Commissioners which was under reference before him, the learned Judge observed at page 22:

> " It appears to me, therefore, that it is quite clear that the commissioners have done this : they have stated their determination, with which the appellants are dissatisfied ; they have stated the facts as found upon which they so determined. The facts as found they have stated in the first part of paragraph 17, and then they have stated in the previous paragraphs the materials on which they so found, and in so doing they have invited, and only invited, the determination in point of law of the question whether there was evidence upon which they could reasonably arrive at the conclusion at which they did arrive ".

The decision in *The Gramaphone and Typewriter, Limited* v. *Stanley*[1], is thus really not a pronouncement on what is a question of law but on what construction was to be put on the statement of the Commissioners which was before the Court. It should be added that the situation envisaged by Cozens-Hardy M. R. in *The Gramaphone and Typewriter, Limited* v. *Stanley*[1], cannot arise under section 66 of the Act, as the Tribunal is itself charged with the duty to decide whether a question of law arises out of its order, and it cannot therefore merely pass it on for the determination of the Court.

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[1] L.R. (1908) 2 K.B. 89 ; 5 T.C. 358.

[2] (1911-1915) 6 T.C. 1.

The decision in *The American Thread Company* v. *Joyce*,[1] was taken on appeal and confirmed by the Court of Appeal, of which it may be noted two of the members, Fletcher Moulton, L.J. and Buckley, L.J. were parties to the decision in *The Gramaphone and Typewriter Limited* v. *Stanley*,[2] and they expressed themselves in agreement with the view taken by Hamilton, J. There was a further appeal to the House of Lords, which in confirming the decision of the Courts below expressly approved of the observations of Hamilton, J. The Earl of Halsbury observed:

> "It is enough to say that they (the Commissioners) have found it, and that there was evidence upon which they might 'find it' and if they did find it, and if there was evidence upon which they might find it, there is no question of appeal here at all. . . . . I should have been contented absolutely to say that I entirely agree with every word of Mr. Justice Hamilton's judgment". (*The American Thread Company* v. *Joyce*)[3].

This decision is particularly important as the finding in that case was itself, as appears from the judgment of Hamilton, J., an inference from facts found and, nevertheless, it was decided that it was a question of fact on which the finding of the Commissioners was final.

I must now refer to another catena of cases relied on by the appellant in support of its contention that inferences from facts are questions of law. They are decisions of the Privy Council as to when a Court of second appeal having authority to review decisions of the lower appellate Court on a question of law could interfere with its findings of fact. In *Ram Gopal* v. *Shamskhaton*[4], one Daud Rao was sought to be made liable on a mortgage to which he was not a party on the ground that he had knowledge of it and had accepted it. In holding that the facts found did not establish any ground of liability, Sir Richard Couch observed:

> "A finding that the bond shewed that the mortgage deed was accepted by the Defendant, as a binding obligation upon him, would be an inference of law, an inference, which, in their Lordships' opinion, is not a just one from the facts which the Commissioner held to be proved. The knowledge of the mortgage, and saying that the money due upon it was repayable, do not amount to an agreement by him to be bound by it. As the mortgage did not purport to be made in any way on behalf of Daud Rao it was not a case for ratification. A new agreement or obligation was necessary to bind him."

Then, after referring to the observations of Lord Watson in *Ramratan Sukal* v. *Mussumat Nandu*[5], that

> "It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final".

Sir Richard Couch continued:

> "The present case does not come within that rule. The facts found need not be questioned. It is the soundness of the conclusion from them that is in question, and this is a matter of law".

It is this last observation that is relied upon for the appellant. But when read along with the other passages quoted above, it clearly recognises the distinction between findings of pure questions of fact and of mixed question of law and fact.

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[1] (1911-1915) 6 T.C. 1

[2] L.R. (1908) 2 K.B. 89: 5 T.C. 358.

[3] 6 T.C. 163, 165.

[4] (1891-92) L.R. 19 I.A. 228 : I.L.R. 20 Cal. 93 (P.C.).

[5] (1891-1892) L.R. 19 I.A. 1 : I.L.R. 19 Cal. 249 (P.C.).

In *Nafar Chandra Pal* v. *Shukus*[1], Lord Buckmaster observed:

> " Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other ; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact ".

The expression "the proper legal effect of a proved fact" is itself indicative that inferences from facts are not all of them questions of law open to consideration in second appeal but only those which involve the application of some legal principle. The actual decision in that case was that the question as to the character of land was one of fact not open to consideration in second appeal.

In *Dhanna Mal* v. *Motisagar*,[2] the point for determination was whether the facts proved were sufficient to establish a right of permanent occupancy. Discussing how far a finding on that question by the lower appellate Court could be disturbed in second appeal, Lord Blanesburgh observed at page 185:

> " It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact—a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court of first appeal must be accepted ".

These observations again emphasise the distinction between inferences which are themselves questions of fact and inferences on mixed questions of law and fact.

This question was the subject of further consideration by the Privy Council in *Wali Mohammad* v. *Mohammad Baksh*[3], *Secretary of State for India in Council* v. *Rameswaram Devasthanam*[4] and *Lakshmidhar Misra* v. *Rangalal*.[5] In *Wali Mohammad* v. *Mohammad Baksh*[3], Sir Benod Mitter exhaustively reviewed the authorities on the questions and stated the law in the following terms:

> " No doubt questions of law and fact are often difficult to disentangle, but the following propositions are clearly established :—
>
> (1) There is no jurisdiction to entrtain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be : see *Durga Choudrain* v. *Jawahir Singh Choudhri*.[6]
>
> (2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact : see *Nafar Chandra Pal* v. *Shukur*[7].
>
> (3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights but were really historical materials, have to be construed for the purpose of deciding the question : see *Midnapur Zamindary Co.* v. *Uma Charan Mandal*[8].
>
> (4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents, and the first Appellate Court had made a mistake as to its meaning : see *Nowbutt Singh* v. *Chutter Dharee Singh*.[9]

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[1] (1917-18) I.L.R. 46 Cal. 189 : L.R. 45 I.A. 183, 187 (P.C.).

[2] (1927) 52 M.L.J. 663 : L.R. 54 I.A. 178 (P.C.).

[3] (1930) I.L.R. 11 Lah. 199 : L.R. 57 I.A. 86 : 59 M.L.J. 53 (P.C.).

[4] (1934) L.R. 61 I.A. 163 : 66 M.L.J. 595 (P.C.).

[5] (1950) 1 M.L.J. 100: L.R. 76 I.A. 271 : I.L.R. 29 Pat. 1 (P.C.).

[6] (1889-90) L.R. 17 I.A. 122, 127: I.L.R. 18 Cal. 23 (P.C.).

[7] (1917-18) L.R. 45 I.A. 183: I.L.R. 46 Cal. 189 (P.C.).

[8] (1923) 45 M.L.J. 663 (P.C.) : 29 C.W.N. 131.

[9] (1873) 19 Suth. W.R. 222.

> Great reliance was placed by the appellants' counsel on *Dhanna Mal* v. *Moti Sagar*[1] but there the tenancy was admitted, and the question was whether it was permanent or not, and the solution of it depended upon what was the legal inference to be drawn from proved facts, or, in other words, the question was what was the legal effect of proved facts."

In *Secretary of State for India in Council* v. *Ramtswaram Devasthanam*[2], where a finding of fact reached by the lower appellate Court on a consideration of the documentary evidence was reversed in second appeal, Sir John Wallis in holding that the High Court had, in interfering with the finding of fact, acted in excess of its powers under section 100 observed:

> "The question is mainly one of fact, and it is well settled that under section 100 of the Code of Civil Procedure the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower Appellate Court, however erroneous, unless they are vitiated by some error of law. Subsequently to the date of the judgments under appeal, the Board has had occasion to emphasise the fact that this rule is equally applicable to cases, such as this, in which the findings of the lower Appellate Court are based on inferences drawn from the documents exhibited in evidence."

If an inference from documents exhibited in evidence is a question of fact, an inference from facts found on the evidence must equally be so.

There is one more decision of the Privy Council bearing on this question. In *Lakshmidhar Misra* v. *Rangalal*,[3] the question was whether the finding of the Subordinate Judge in appeal that there had been a dedication of certain lands as cremation ground could be reversed in second appeal. In holding that the finding was open to review by the High Court, Lord Radcliffe observed:

> "Issue No. 5, (whether the land was a cremation ground) is essentially a mixed question of law and fact. There are findings of fact by the Subordinate Judge which must indeed be accepted as binding in any consideration of this matter on further appeal; but his actual conclusion that there had been a dedication or lost grant is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself".

These observations lend no support to the broad contention of the appellant that inferences from facts are of necessity and always questions of law.

We have discussed the authorities at great length, as some of the observations contained therein appear, at first sight, to render plausible the conention of the appellant, and it seems desirable that the true meaning of those bservations should be clarified, lest error and misconception should embarrass nd fog the administration of law. The position that emerges on the authoities may thus be summed up:

(1) When the point for determination is a pure question of law such as onstruction of a statute or document of title, the decision of the Tribunal s open to reference to the Court under section 66 (1).

(2) When the point for determination is a mixed question of law and act, while the finding of the Tribunal on the facts found is final its decision s to the legal effect of those findings is a question of law which can be reviewd by the Court.

(3) A finding on a question of fact is open to attack under section 66 1) as erroneous in law when there is no evidence to support it or if it is pererse.

(4) When the finding is one of fact, the fact that it is itself an inerence from other basic facts will not alter its character as one of fact.

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[1] (1927) 52 M.L.J. 663: L.R. 54 I.A. 178 (P.C.).

[2] (1934) L.R. 61 I.A. 163=66 M.L.J. 595 (P.C.).

[3] (1951) L.R. 67 I.A. 271=I.L.R. 29, Pat. 1=(1950) 1 M.L.J. 100 (P.C.).

Applying these principles, admittedly there is no question here of construction of any statutory provision or document of title. The issues which arise for determination whether the sales entered in the books of the appellant in the names of the intermediaries were genuine and if not, to whom the goods were sold and for what price are all questions of fact. Their determination does not involve the application of legal principls to facts established in the evidence. The findings of the Tribunal are amply supported by evidence and are eminently reasonable. It should, therefore, follow that there is no question which could be referred to the Court under section 66 (1).

It was argued for the appellant that what the Tribunal had found was that the intermediaries, firms and companies were benamidars for the appellant, that a question of benami was one of mixed law and fact, and that accordingly a finding thereon was open to review under section 66 (1). Whether that is a correct reading of what the Tribunal had found will presently be considered. Assuming that such is the finding, what is the ground for holding that a finding of benami is one of mixed law and fact? The only basis for such a contention is that the finding that a transaction is benami is a matter of inference from various primary basic facts such as who paid the consideration, who is in enjoyment of the properties and the like. But that is not sufficient to make the question one of mixed law and fact unless, as already stated, there are legal principles to be applied to the basic findings before the ultimate conclusion is drawn. But no such principles arise for application to the determination of the question of benami, which is purely one of fact, and none has been suggested by the appellant.

In *Gangadara Ayyar* v. *Subramania Sastrigal*,[1] the Federal Court had to consider whether concurrent findings of benami by the Courts below could be reviewed by it, and it was held that it could not be done as the practice of the Court was *not to interfere with concurrent findings of fact* unless there were exceptional grounds therefor and that there were none such in that case. It should be noted that the finding of benami in that case was a matter of inference from primary facts found which are set out at page 573. But it was nevertheless held to be a question of fact. In *Misrilal* v. *Surji*[2], it was held by the Privy Council that a finding of benami was one of fact not open to attack in second appeal. This contention of the appellant must accordingly be rejected.

It was next contended that the finding of the Tribunal that the intermediaries, firms and companies were benamidars for the appellant was bad for the following reasons:

(1) It had been reached without due consideration of several matters relevant for such a determination.

(2) The finding of benami in so far as it related to the companies was bad for not considtring the tests laid down in *Smith, Stone and Knight* v. *Lord Mayor, Aldermen and Citizens of the City of Birmingham*,[3] as material for a decision on the point.

(3) On the facts found, the proper conclusions to come to was that the intermediaries were benamidars not for the appellant but for Mr. Thyagaraja Chettiar of the Managing Agents firm.

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[1] (1949) 1 M.L.J. 568 : A.I.R. 1949 F.C. 88 : 1949 F.L.J. 90 (F.C.).

[2] A.I.R. 1950 P.C. 28 : (1950) 1 M.L.J. 294.

[3] (1939) 4 A.E.R. 116.

These contentions will now be considered. As regards the first contention, the argument on behalf of the appellant was this:—An important test for determining whether a transaction is benami is to discover the source of consideration for the transfer. When the question is whether firms and companies are benamidars for another person, what has to be found is whether it was the latter who found the capital of those concerns. The firms and companies had according to their books their own capital, and there is no finding that the appellant subscribed it. Another important test of benami is to find who has been in enjoyment of the benefits of the transaction. It has not been shown that the profits of the intermediarits had been utilised by the appellant. Therefore, the finding that the intermediaries were benamidars of the appellant could not stand.

Now, the assumption underlying this argument is that the Tribunal had found in its order that the intermediaries were benamidars for the appellant, but there is no basis for this in the order. In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when *A* sells properties to *B* but the sale deed mentions *X* as the purchaser. Here the sale itself is genuine, but the real purchaser is *B*, *X* being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when *A* purports to sell his property to *B* without intending that his title should cease or pass to *B*. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or *B*, to enquire into the question as to who paid the consideration for the transfer, *X* or *B*. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid. Therefore, there will be force in the contention of the appellant that a finding as to who furnished the capital for the intermediaries was requisite before they could be held to be benamidars, if the Tribunal had held them to be benamidars in the former sense but not in the latter. We must, therefore, examine what it is that the Tribunal has actually found. Now, the Tribunal has not held that any of the transactions with which the assessment proceedings are concerned are benami. Indeed, the word 'benami' does not find a place anywhere in its order. It is only in the question which the appellant framed for reference to the Court in its application under section 66 (1) that it has chosen for the first time to introduce the word 'benamidar'. That apart, looking at the substance of the finding, the point that arose for determination before the taxing authorities was what profit the appellant had made on certain sales standing in its books in the names of the intermediaries. If the sales were true, the amounts shown in the books as price received therefor would be the basis for working out of the profits, and that was the stand of the appellant; but the authorities held that those sales were sham and the entries relating to the payment of price therefor fictitious. Then, they found that the concerned goods were sold by the appellant directly to its own constituents, that the price paid by them was actually received by it, and that that should be the basis for calculating its profits. Thus, the point which was actually in issue in the proceedings was a question of benami in the second sense and not in the first, and to decide that, the Tribunal had only to find whether any price was paid by the intermediaries for the sales and not who paid the price for them. It is scarcely necessary to add that no question arises as to whether the intermediaries are benamidars for the ultimate purchasers, because the claim of the former is that they had sold the goods to the latter under fresh contracts at different prices. Nor could there be a question of benami in the first sense, as that could arise only between a party to a deed and another who is *eo nomine* not a party to it but claims to be beneficially entitled to the properties conveyed by the deed. Therefore, on the findings of the Tribunal, the question whether the intermediaries were benamidars for the appellant could not arise, and the further question as to who found the capital for the intermediaries is altogether irrelevant. Likewise, on the finding that the yarn was really sold by the appellant not to the intermediaries but to its own constituents and that they paid the price therefor to the appellant, the question who had the benefit of the transaction could not arise either.

(2) It is next contended that some of the intermediaries were private limited companies registered in accordance with the provisions of the Companies Act and were in law distinct legal entities as held in *Aron Solomon* v. *A. Solomon and Company, Limited*[1], and that they could not be held to be benamidars for the appellant without deciding the matters mentioned by Atkinson, J. in *Smith, Stone and Knight* v. *Birmingham Corporation*[2]. The learned Judge observed at page 121:

> " It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own. I have looked at a number of cases—they are all revenue cases—to see what the courts regarded as of importance for determining that question. There is *San Paulo (Brazilian) Railway Co.* v. *Carter*[3]. *Apthorpe* v. *Peter Schoenhofen Brewery Co., Ltd.*[4], *Frank Jones Brewing Co.* v. *Apthorpe*[5], *St. Louis Breweris* v. *Apthorpe*[6] and I find six points which were deemed relevant for the determination of the question : who was really carrying on the business ? In all the cases, the question was whether the company, an English company here, could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere. The first point was : Were the profits treated as the profits of the Company ?—When I say 'the company' I mean the parent company—Secondly, were the persons conducting the business appointed by the parent company ? Thirdly, was the company the head and the brain of the trading venture ? Fourthly, did the company govern adventure decide what should be done and what capital should be embarked on the venture ? Fifthly, did the company make the profits by its skill and direction ? Sixthly, was the company in effectual and constant control ?"

The contention of the appellant is that before the intermediaries could be held to be benamidars for the appellant, findings ought to have been recorded on the six points mentioned in the judgment of Atkinson, J. This contention proceeds on a misapprehension as to the true scope of the above observations and of the decisions referred to therein. In those cases, the question was whether the profits earned by a subsidiary company *X* could be held to be profits earned by the parent company *A* and taxed in the hands of company *A*. It was held that the fact that *X* was a legal entity did not stand in the way of its profits being treated as profits of *A*, if, as observed by Lord Sterndale in *Inland Revenue Commissioners* v. *Sansom*[7], *X* was doing the business of *A* and not its own, and various tests were laid down for ascertaining whether it was *A* who was running the business of *X*. But here, no such question arises. The true scope of the assessment proceedings is to discover what profits were really made on certain sales effected by the appellant, and the intermediaries came into the picture only as the person in whose names the sales were made.

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[1] L.R. (1897) A.C. 22.

[2] (1939) 4 A.E.R. 116.

[3] L.R. (1896) A.C. 31 : 3 T.C. 407.

[4] (1899) 4 T.C. 41.

[5] (1898) 4 T.C. 6.

[6] (1898) 4 T.C. 111.

[7] L.R. (1921) 2 K.B. 492 ; 8 T.C. 20.

The question whether apart from those sales the intermediaries were genuine commercial bodies having existence independent of the appellant did not arise for determination, as a finding that they were such bodies would have had no effect on the chargeability of the appellant to tax on the profits made by it on the sales in question.

The question of the true status of the intermediaries would have assumed practical importance if they had done business other than the sales in question and had made profits thereon, and those profits were sought to be taxed as profits made by the appellant. It would then be a legitimate contention for the appellant to advance that that could not be done unless the intermediaries were found to have been really benamidars for it. In that case, it would have been important to consider who found the capital for the concerns and who was running them. But here, the tax is levied only on the profits ostensibly earned by the intermediaries on the sales which stand in the books of the appellant in their names. If those sales are sham, then the order of assessment must stand even if the intermediaries were real concerns which had found their own capital and earned their own profits in other transactions. If an individual *A* carrying on his own business lends his name to the business transaction of *B*, the latter cannot escape the obligation to pay the tax on these transactions on the ground that *A* had also his own genuine business. Likewise, if companies doing their own business lend their names to business transactions of other persons, those other persons cannot be heard to say that they are not taxable on the profits of these transactions for the reason that the companies were also carrying on their own business. Therefore, on the finding that the sales were sham, no question arises as to the constitution or status of the intermediaries. It is true that the Tribunal has directed that all the profits earned by the intermediaries should be added to the profits of the appellant but that is because it has found that the intermediaries did no business other than the transactions of the appellant. And this finding clearly reveals how hollow and unsubstantial the contentions of the appellant are as to the sources of capital for the intermediaries and the application of the tests laid down in *Smith, Stone and Knight* v. *Birmingham Corporation*.[1] It is a most unreal question to raise of firms and companies whose only business consists of sham transactions as to who found the capital for them or who was running them.

(3) It is next contended that though the facts proved might justify a finding that the intermediaries were benamidars, they did not necessarily lead to the conclusion that they were benamidars for the appellant. It is argued that on the findings of the Tribunal that it was Mr. Thyagaraja Chettiar, the Managing Agent of the appellant, that had set up the intermediaries, that it was his relations and men who had been put up as partners and shareholders of those concerns, and that it was he that generally had the control of the business, the proper inference to draw was that the intermediaries were benamidars for Mr. Thyagaraja Chettiar, and that in consequence their profits were liable to be added to his and not to those of the appellant. This argument again proceeds on the assumption that the profits of the intermediaries have been taxed in the hands of the appellant on the ground that they are its benamidars. But, as already stated, that is not the true position. What are sought to be taxed in these proceedings are the profits made on certain sales and not the profits made by the intermediaries as distinct entities chargeable to tax under section 3 of the Act, and the only relevant points for decision are, what profits were made on those sales and by whom. On the finding that the appellant sold the goods direct to the ultimate purchasers and recovered the price therefor, it is only the appellant that could be taxed for the profits made thereon and not

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[1] (1939) 4 A.E.R. 116.

the Managing Agent. It is of no consequence that in form the order is that the profits of the intermediaries should be added to those of the appellant, because, as pointed out in discussing the previous contention of the appellant of which the present is but a repetition in another form, the intermediaries did no other business than the sales concerned in this assessment, so that the profits of the business mean the same thing as profits made on the concerned sales.

There is another aspect of the matter, which calls for notice. If the contention of the appellant that the intermediaries were benamidars for Mr. Thyagaraja Chettiar is accepted, it means that he had, by availing himself of his position as Managing Agent, unjustly enriched himself at the expense of the shareholders to the tune of over Rs. 25 lakhs. Now Mr. Thyagaraja Chettiar is the dominant member of the firm of Managing Agents. It is this firm that has been in management of the affairs of the company at all times and has been representing it in the assessment proceedings at all stages, and it is through this firm that the appellant speaks in the present appeals. The position then is that Mr. Thyagaraja Chettiar as Managing Agent of the appellant charges himself in his individual capacity with conduct which is grossly fraudulent and infamous, so that the company might escape its liability to tax. This, to our minds, is a most surprising position to take. But we are not concerned here with the ethics of it and must consider it on its merits so long as the law does not bar it. But what are its merits? The position which the appellant took up with reference to this matter at the several stages of the assessment has been neither uniform nor even consistent. Thus, before the Appellate Assistant Commissioner its argument was that the Managing Agent had been the protector of the interests of the company at all times, that he had "stood by it in its lean years" and should "not therefore be presumed to have acted against the interests of the company" and that therefore the transactions in the names of the intermediaries should be accepted as genuine. Before the Tribunal, the contention was that even if the intermediaries were bogus concerns "it might be that some other individual got the benefit and not the company". Thus, the contention now advanced was not thought of in the earlier stages and was still nebulous and in the making, when the matter was before the Tribunal, and it is only in the argument before us that it has assumed a definite and concrete shape.

Dealing with the contention as advanced before it, the Tribunal referred to several facts such as that the sales in favour of the intermediaries were for unusually large quantities and for prices far below the market rate and even the cost of production, that the appellant was a public company with a Board of Directors in charge of its business, and that they must have known all about these transactions. Is it likely that the Directors would have accepted these sales involving such huge loss to the company and carried on regularly from month to month and year to year during the whole of this period as proper and genuine, unless they considered that it was the company and not Mr. Thyagaraja Chettiar who was to have the benefit of them? It was argued by the learned Solicitor-General for the respondent that if on the facts two inferences were possible and the Tribunal chose to draw one and not the other, it was not a matter in which the Court could interfere, if the inference is one of fact. That is a proposition of law well settled, and has not been disputed. Now, on the facts, two inferences are possible. One is that the object of the Managing Agent was to defraud the shareholders by purchasing goods himself at a low valuation for his own benefit and that the intermediaries were set up by him for that purpose. The other is that they were set up for the purpose of concealing portions of the profits earned by the company so as to reduce the tax to which it was liable to be assessed. The former involves cheating the shareholders; the latter, evading the tax due to the State. Is it an unreasonable inference for the Tribunal to draw that the motive by which the Managing Agent was actuated was the latter and not the former? Is it not more legitimate to presume that the Managing Agent wanted to benefit the shareholders by reducing the tax rather than he wanted to defraud them by himself purchasing the goods for a low price in the names of the intermediaries? If the Tribunal came to the former conclusion and it is one which could reasonably come to on the materials, it is not one which the Court can review, being one of fact. This ground of attack also must be rejected. In the result, all the contentions of the appellant based on the assumption that the intermediaries had been held to be benamidars for the appellant must be overruled on the ground that on the findings of the Tribunal they do not really arise.

Lastly, it was contended that the profits earned by the intermediaries had not been brought into the books of the company as its income, had not been included in its balance-sheet and had not been distributed as dividends or added to its reserves, and, not having been treated as its income or profits, could not be taxed. The decisions in *St. Lucia Usines and Estates Company Limited* v. *Colonial Treasurer of St. Lucia*[1], *Commissioner of Taxes* v. *The Melbourne Trust Limited*[2] and *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga*[3] were quoted in support of this contention. This question is, however, no longer *res integra,* and is covered by the decision of this Court in *Commissioner of Income-tax* v. *K. R. M. T. T. Thyagaraja Chetty*[4]. There, the assessee which was no other than the firm of Messrs K. R. M. T. T. Thyagaraja Chettiar and Co., the Managing Agents of the present appellant, failed to bring into its profit and loss account a certain amount which it had earned as commission, and the point for decision was whether that amount was liable to tax. The contention of the assessees was that it was not liable as it had not been treated as profits by the assessee and the decisions in *St. Lucia Usines and Estates Company Limited* v. *Colonial Treasurer of St. Lucia*[1], *Commissioner of Taxes* v. *The Melbourne Trust Limited*[2] and *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga*[3] were relied on in support of this position. But this Court disagreed with this contention, and held that the liability to pay tax on the income arose when it had arisen or accrued and that how the assessee dealt with it subsequently did not affect that liability, and distinguished the decisions in *St. Lucia Usines and Estates Company Limited* v. *Colonial Treasurer of St. Lucia*[1] and *Commissioner of Taxes* v. *The Melbourne Trust Limited*[2] on the ground that they were pronouncements on the particular statutes there under consideration and were not authorities on the question of assessment of profits and gains under the Indian Income-tax Act. Applying this decision, the appellant having been found to have sold its goods to the ultimate purchasers and received the prices, there can be no qustion but that the profits had accrued to it both in the business and in legal sense and that liability to tax had arisen. If an individual were to sell goods and receive the price therefor, that would be income accrued or arisen, liable to tax in his hands even though he should have failed to enter it in his accounts. A party cannot avoid tax by adopting the simple expedient of not disclosing its receipt in his books. That will be a case of income accrued or arisen but concealed and not of income not accrued or arisen This is conceded by the appellant. But it is argued that different considerations arise in the case of companies registered under the Indian Companies Act, because there are provisions in the Act as to how the profits are to be disposed of, such as distribution of dividends or adding to the reserve and until that was done, there was no accrual of income or of profits under the statute. This is to confuse accrual of income with the disposal of it. Income which has accrued to an assessee might remain undisposed of by him, but the liability to tax attaches to it under the provisions of the Indian Income-tax Act as soon as it accrues. It is no concern of the revenue how and when profits are disposed of by the assessees, and for this purpose it makes no difference whether the assessee is an individual or a company, both of them being equally liable to tax on income and profits when they have arisen or accrued. The provisions of the Companies Act as to the disposal of profits are designed to protect the interests of the shareholders and have no effect on the right which the State has under the provisions of the Act to impose a tax on income when it arises or accrues. It should also be mentioned that though the decision in *Commissioner of Income-tax* v. *K.R.M.T.T. Thyagaraja Chettiar*[1] relates to a firm and not a company, the decision in *St. Lucia Usines and Estates Company Limited* v. *Colonial Treasurer of St. Lucia*[2] and *Commissioner of Taxes* v. *The Melbourne Trust Limited*[3] which were held to be inapplicable to the imposition of a charge under the Indian Income-tax Act related to companies, and the argument and the decision proceeded on the footing that the principles applicable were the same both to firms and companies. The decision in *Commissioner of Income-tax* v. *K. R. M. T. T. Thyagaraja Chettiar*[1] must accordingly be held to conclude this question against the appellant.

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[1] L.R. (1924) A.C. 508.

[2] L.R. (1914) A.C. 1001.

[3] (1933) 64 M.L.J. 612 : I.L.R. 12 Pat. 318 : L.R. 60 I.A. 146 (P.C.).

[4] (1954) S.C.R. 258 : (1953 S.C.J. 734: (1953) 2 M.L.J. 823 (S.C.).

It must be said of this contention that it was raised before the Tribunal and negatived. Being a question of law, the appellant had a right to have it referred to the Court under section 66 (1). But the question as framed by the appellant in its application under section 66 (1) did not specifically raise this point; nor does it appear to have been argued in the High Court. As the matter is now concluded by authority, it will be an idle formality to direct the Tribunal to refer the question for the decision of the Court. The powers of this Court in appeal under Article 136 are not intended to be exercised for such a purpose. That disposes of the main and substantial questions that have been agitated in these proceedings.

There is one other matter in respect of which the appellant sought reference to the Court in its application under section 66 (1). The facts relating to this matter are that during the periods of assessment with which the appeals are concerned, the appellant opened branches in the States of Travancore, Cochin, Pudukottah and Mysore, and sold yarn to its constituents in those States through these branches. The point in dispute is whether the profits made by the appellant on those sales are chargeable to tax. The contention of the appellant before the Tribunal was that the matter was governed by section 14 (2) (*c*), and that the profits could be taxed only if they were remitted to British India. That was not disputed by the Department, but they contended that as the appellant sold in the States goods manufactured by it in British India, the governing provisions were sections 42 (1) and 42 (3), and that under these provisions, the appellant was liable to be taxed on such portions of the profits as were apportionable to the manufacture of the goods in British India. That was accepted by the Tribunal, and the profits were apportioned in the ratio of 85:15. In its application under section 66 (1), the appellant raised the contention that sections 42 (1) and 42 (3) applied only to non-residents, and that it was only section 14 (2) (*c*) that would apply to residents and applied to have that question referred to the decision of the Court. But the Tribunal held that the decision of this Court in *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai and Co.*[4] had settled that sections 42 (1) and 42 (3) applied both to residents as well as non-residents and consequently declined to refer the question.

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[1] (1954) S.C.R. 258 : (1953) S.C.J. 734 : (1953) 2 M.L.J. 823 (S.C.).

[2] L.R. (1924) A.C. 508.

[3] L.R. (1914) A.C. 1001.

[4] (1950) S.C.R. 335 : 1905 S.C.J. 374 (S.C.).

The correctness of this decision does not appear to have been contested before the High Court, the only point dealt with in the judgment of the learned Judges being as to the correctness of the ratio in which the apportionment was made. Even in this Court, it was only this question that was pressed on the strength of the decision in *Commissioner of Income-tax and Excess Profits Tax* v. *S. Sen*[1]. Section 14 was mentioned in the course of the argument, but no contention was advanced that sections 42 (1) and 42 (3) applied only to non-residents, and the decision in *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai and Co.*[2], was not even so much as referred to in the course of the argument, and the appellant did not even ask for this question being referred. That apart, in view of the decision in *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai and Co.*[2], no purpose would be served by directing a reference of this question, and the Tribunal was right in observing that "it is not even of academic interests to refer the said question to the High Court". On the question whether the fixation of ratio was correct, we are of opinion that it is a pure question of fact, and is not open to reference under section 66 (1).

In the result, the appeals fail, and are dismissed with costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, S. K. DAS AND P. GOVINDA MENON, JJ.

The Clerks and Depot Cashiers of the Calcutta Tramways Co. Ltd.	.. *Appellants**
v.	
Calcutta Tramways Co., Ltd.	.. *Respondent.*
State of West Bengal	.. *Intervener.*

Constitution of India (1950), *Article* 136—*Powers of Supreme Court to interfere with decisions of Tribunals on questions of fact—Necessary pre-requisites for exercise of—Fixing of dearness allowance by Labour Appellate Tribunal—Interference.*

Wide and undefinable with exactitude as the powers of the Supreme Court are, it is now well settled that generally the necessary pre-requisites for the Court's interference to set right decisions arrived at by Tribunals whose conclusions on question of fact are final, can be classified under the following categories namely,

(i) where the Tribunal acts in excess of the jurisdiction conferred upon it under the statute or regulation,

(ii) Where there is an apparent error on the face of the decision and

(iii) where the Tribunal has erroneously applied well accepted principles of jurisprudence.

It is only where errors of this nature exist, that interference is called for.

Where the Labour Appellate Tribunal, in computing the dearness allowance has considered various methods and adopted one of them it is difficult to say that there is any question of principle at all.

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[1] 1949 I.T.R. 355.

[2] (1950) S.C.R. 335 : 1950 S.C.J. 374 (S.C.)

* C.A. No. 105 of 1954. 11th October, 1956.

In matters of the grant of dearness allowance except to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, it is impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance. More so in the case of the middle classes.

(Appeal by special leave from the judgment and order dated the 6th November, 1952 of the Labour Appellate Tribunal, Calcutta in Appeal, No. Cal.-3 of 1952 arising out of the award dated the 25th September, 1951 of the Court of District Judge, Industrial Tribunal, Calcutta in Case No. VIII-23 of 1951).

S. C. Isaacs, Senior Advocate (*A. K. Datt* and *Sukumar Ghose,* Advocates, with him) for Appellants.

M. C. Setalvad, Attorney-General for India (*D. R. Das* and *S. N. Mukherji,* Advocates, with him) for Respondent.

B. Sen, Senior Advocate (*P. K. Bose,* Advocate, with him) for Intervener.

The Judgment of the Court was delivered by

Govinda Menon, J.—This appeal is by special leave against the decision of the Labour Appellate Tribunal of India, Calcutta, which modified the award, passed by the Industrial Tribunal, Calcutta, in the matter of a dispute referred to it by the Government of West Bengal, for adjudication with regard to the rates of dearness allowance for clerks and Depot cashiers, employed by the Calcutta Tramways Coy., Ltd., numbering about 600, out of a total of 10,000 workmen. Disputes having arisen between the workmen of the Calcutta Tramways Coy. Ltd. (which may hereafter be called 'The Company') on the one hand, and the employers on the other, relating to the dearness allowance payable to the workmen, there were two previous awards, one dated May 16, 1947, by Sri S. N. Guha Roy, and the other dated October 27, 1948, by Sri P. K. Sircar. Both of these awards related to all the employees of the Company and not to the clerks and Depot cashiers alone. Subsequently a reference was made by the West Bengal Government on 13th June, 1951, concerning a dispute relating to the dearness allowance of the workmen of the Company, excluding clerks and Depot cashiers. There was an award and an appeal, and in that appeal the Appellate Tribunal increased the dearness allowance by Rs. 7-8-0 for workmen in the pay ranges below Rs. 50 and up to the pay range of Rs. 250 and by a flat rate of Rs. 5 in the higher pay ranges taking the cost of living index of the workmen class at 370 points.

In the present award, which relates to the clerks and the Depot cashiers alone, the Industrial Tribunal gave Rs. 47-8-0 as dearness allowance for a pay range of Rs. 51 to Rs. 100 and provided for a progressive increase of Rs. 5 for each slab of Rs. 50 in the pay range. The Appellate Tribunal increased the amounts so awarded by Rs. 2-8-0 more than what was granted to the other workmen of the Company. The cost of living index for the middle class families had been fixed by an investigating body of the Bengal Chamber of Commerce during the relevant year at 382 points, whereas the index in the case of working class was fixed at 370 points. The increased amount awarded for the various pay ranges and shown in the decision of the Labour Appellate Tribunal which need not be repeated again, was founded on these cost of living indices though the amount was not the same as recommended by the Bengal Chamber of Commerce.

Before the Labour Appellate Tribunal, as well as the Industrial Tribunal, the claim put forward on behalf of the clerks and Depots cashiers was that the dearness allowance should be on the same rates as decided upon by the Bengal Chamber of Commerce of which the company is a member and no difference should have been made between the dearness allowance recommended by the Bengal Chamber of Commerce and that to be awarded by the Industrial Tribunal. In fact, what was urged was that the recommendation of the Bengal

Chamber of Commerce ought to have been accepted in its entirety for the reason not only that the Company is a first class member of the Chamber but also that the class of persons, namely, the middle classes for whom the recommendation was intended, includes clerks and Depot cashiers of the Company as well, and the same having been accepted by the Mercantile Tribunal which dealt with the dearness allowance payable to the employees of the mercantile firms in Calcutta, the Industrial Tribunal,as well as the Labour Appellate Tribunal should have followed the same. The learned Judges of the Appellate Tribunal held that those recommendations were made to the mercantile firms where the workmen consist practically of the clerical and subordinate staff as opposed to Tramways Company where the large percentage of workmen belong to other categories, the clerks and Depot cashiers being only a small minority, though they found that the cost of living index found by the Bengal Chamber of Commerce should be accepted as the criterion for awarding the increased dearness allowance in the case of the employees of the Company as well.

On behalf of the appellants it is urged before us that a different mode of treatment than the one recommended by the Bengal Chamber of Commerce should not have been resorted to in the case of the appellants for the reason that those recommendations are intrinsically reasonable, considering the uniformity of life and modes of habit of the middle classes to which the clerks and Depot cashiers belong. The respondent Company being a member of the Bengal Chamber of Commerce should, instead of ignoring the recommendation, have acted upon it as a mandate, so that its action as a member should not be inconsistent with that followed by others especially since there have been no valid reasons alleged for the non-acceptance of the recommendation. It is further urged that there is no acceptable defence put forward that the abovementioned recommendation will not apply to institutions having a mixed staff as the Company in question. On the other hand, what is stated in the written statement of the Company is that according to the previous award it had been paying a uniform sliding scale of dearness allowance for all categories of workmen as detailed in paragraph 6 (*b*). It is, therefore, contended that what the Industrial as well as the Appellate Tribunal should have done was to have evolved a principle to fix the dearness allowance in relation to the basic salaries and the cost of living index, as that alone would satisfy the recommendations of the Bengal Chamber of Commerce.

We have, therefore, to see whether in following the course now adopted by the Tribunals below they have ignored any legal principle or acted in violation of any statute. There can be no doubt whatever that if the scheme adumbrated by the Bengal Chamber of Commerce is adopted in the case of clerks and Depot cashiers, they would get amounts far in excess and out of all proportion to what were awarded to the other workmen whose appeal had already been disposed of by the Appellate Tribunal though it has to be recognized that the cost of living index in the case of the appellants has to be considered to be more than the index of workmen whose avocations are the result of physical labour rather than of mental faculties. In short, the clerks and Depot cashiers should be considered as the white collared fraternity.

In these circumstances, we have to find out whether the procedure followed by the Labour Appellate Tribunal, namely, leaving out 20 points un-neutralised and allowing Rs. 5 per 20 points rise in the living cost index but taking into consideration a higher living cost index of 382 in the case of the appellants as compared with the average index of the workmen of 370, is a justifiable method to be adopted.

It is difficult to hold that the middle classes in this country can be said to form a separate stratum of society even in a city like Calcutta having the same mode of life, the same necessities, uniform requirements and comforts. There are different grades even among the middle classes and it is unwise to predicate the same degrees of comforts and necessities for everyone who is said to belong to the middle classes. Such being the case, to say that the clerks in the mercantile firms can be considered equal in all respects to the 600 clerks and Depot cashiers of the Company, is an argument which cannot be accepted as sound. The Labour Appellate Tribunal has not completely ignored the recommendations of the Bengal Chamber of Commerce, for it is seen that in raising the amount awarded by the Industrial Tribunal the Appellate Tribunal has based its conclusion on the higher cost of living index in the case of middle class employees.

Such being the case, the point for consideration is whether any question of principle is involved, so that this Court might interfere with the conclusions arrived at by the Labour Appellate Tribunal. Wide and undefinable with exactitude as the powers of the Court are (see *Dhakeswari Cotton Mills, Ltd.* v. *Commissioner of Income-tax, West Bengal*[1]) it is now well-settled that generally the necessary pre-requisites for this Court's interference to set right decisions arrived at by Tribunals whose conclusions on questions of fact are final can be classified under the following categories, namely, (*i*) where the Tribunal acts in excess of the jurisdiction conferred upon it under the statute or regulation creating it or where it ostensibly fails to exercise a patent jurisdiction; (*ii*) where there is an apparent error on the face of the decision and (*iii*) where the Tribunal has erroneously applied well-accepted principles of jurisprudence. It is only when errors of this nature exist, that interference is called for. In the present case the appellants have not been able to show that there is any deviation from those principles. If the Tribunal below had failed to resort to a basic principle, then something might have been said but what has been done is, that in computing the dearness allowance it has considered various methods and adopted one of them. That being the case, it is difficult to say that there is any question of principle at all.

The report of the Central Pay Commission at page 46, in paragraph 71, made the following recommendation:

> "Without adopting such a complicated procedure, we think it sufficient to provide by slabs for persons on different levels of pay, as should in the accompanying table which also provides for diminishing rates of dearness allowance as the cost of living index falls, taking the stages by 20 points at a time".

It refrained from recommending the neutralisation of the entire higher cost of living by means of dearness allowance.

The report of the Committee on Fair Wages appointed by the Government of India in Chapter IV, dealing with Wage Adjustments considered in paragraph 43 the various modes and methods of granting relief to meet the burden of increased cost of living and came to the conclusion that there is no practice of uniformity in the extent of compensation given to employees to meet the increased cost of living. It observed as follows:—

> "The Pay Commission has accepted the principle that the lowest paid employee should be reimbursed to the full extent of the rise in the cost of living and that higher categories of employees should receive a diminishing but graduated scale of dearness allowance. The Pay Commission has rejected the principle of a flat rate for all categories of employees, irrespective of their basic salaries".

Finally it came to the conclusion "that for the lowest categories of employees the target should obviously be compensation to the extent of 100 per cent. of the increase in the cost of living. For categories above the lowest we agree that the same consideration will not apply. A flat rate equal to the rate allowed to the least skilled worker is not likely to satisfy higher categories".

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[1] (1955) S.C.J. 122 : (1955) 1 S.C.R. 941, 949.

In the analysis regarding the Industrial Awards, issued by the Government of India, Ministry of Labour, the question of dearness allowance is considered somewhat elaborately. At page 33 there is a discussion regarding the linking of dearness allowance to the cost of index numbers and as to whether a flat rate of dearness allowance irrespective of the income group should be allowed or not. They further considered the linking of dearness allowance to the cost of living index numbers on the scale of income groups, but at rates diminishing with the income received. A perusal of the fairly elaborate discussion in Chapter III shows that there cannot be a hard and fast rule applicable to all kinds of employees. Very much will depend upon the conditions of labour, the nature of the locality and the mode of living.

In *Buckingham and Carnatic Company Ltd., Madras* v. *Workers of the Company*[1] the Tribunal considered the question of neutralisation of the rise of the cost of living by the grant of dearness allowance and was of the opinion that cent. per cent. neutralisation cannot be allowed, as it would lead to a vicious circle and add fillip to the inflatory spiral. It further held that there was no reason why the Industrial worker should not make sacrifices like all other citizens. We can now take it as settled that in matters of the grant of dearness allowance except to the very lowest class of manual labourers whose income is just sufficient to keep body and soul together, it is impolitic and unwise to neutralise the entire rise in the cost of living by dearness allowance. More so in the case of the middle classes.

The criterion to be adopted in the fixation of dearness allowance is also considered in *Mahomad Rai Akbarali Khan* v. *The Associated Cement Companies, Ltd.*[2] where similar principles are discussed.

On behalf of the appellants our attention was invited to certain observations contained in *The Millowners' Association, Bombay* v. *The Rashtriya Mill Mazdoor Sangh*[3], but we do not think that any different principle is enunciated there at all. Mr. Isaacs, the learned counsel for the appellants, laid great stress on the decision in *Workmen of the Firestone Tyre and Rubber Company of India Ltd., Bombay* v. *Firestone Tyre and Rubber Company of India Ltd., Bombay*[4] where the Tribunal expressed the opinion that dearness allowance is intended to neutralise rise in the cost of living and as there is a well recognised difference between the clerical staff and other workmen in their cost of living, the latter are not entitled to claim the allowance on the same basis. From this the learned counsel contends that the recommendations of the Bengal Chamber of Commerce should be accepted *in toto*. In our opinion, tht decision does not help the point of view put forward on behalf of the appellants. In fact, the Labour Appellate Tribunal has made a distinction between the physical labourers and the clerks and Depot cashiers in whose work it is not alone the physical exertion that is essential but some kind of mental and brain work as well and accordingly the higher cost of living index taken into account.

In such circumstances, it seems to us that the Labour Appellate Tribunal has, after considering the various points of view, come to the correct conclusion in awarding the dearness allowance it did. There is no question of law or principle involved and the appeal has to be dismissed with costs of the Calcutta Tramways Co., Ltd.

The State of West Bengal, which has intervened during the appeal, will bear its own costs.

Appeal dismissed.

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[1] (1952) L.A.C. 490, 519, 520.

[2] (1953) L.A.C. 677.

[3] (1955) L.A.C. 371.

[4] (1953) L.A.C. 509.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—B. JAGANNADHADAS, T. L. VENKATARAMA AYYAR, B. P. SINHA AND S. K. DAS, JJ.

Deoki Nandan .. *Appellant**

v.

Murlidhar and others .. *Respondents.*

Religious Endowment—Temple—"Private" or "Public"—Test.

A religious endowment must be held to be private or public, according as the beneficiaries thereunder are specific persons or the general public or sections thereof.

When a temple is built, idol installed therein and properties endowed therefor, the true beneficiaries are not the idols but the worshippers, and the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers. When property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers.

[On a consideration (1) of the will of the founder, (2) user of the temple by the public, (3) the ceremonies relating to the dedication and (4) other facts relating to the character of the suit temple it was held that the Thakurdwara of Sri Radhakrishnaji in Bhadesia is a public temple.]

On appeal from the judgment and decree dated the 14th July, 1948 of the Chief Court of Audh, Lucknow in Second Appeal No. 365 of 1945 arising out of the decree dated the 30th May, 1945 of the Court of District Judge, Sitapur in Appeal No. 4 of 1945 against the decree dated the 25th November, 1944 of the Court of Additional Civil Judge, Sitapur in Regular Civil Suit No. 14 of 1944.

A. D. Mathur, Advocate for Appellant.

Jagdish Chandra, Advocate for Respondent No. 1.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The point for decision in this appeal is whether a Thakurdwara of Sri Radhakrishnaji in the village of Bhadesia in the District of Sitapur is a private temple or a public one in which all the Hindus are entitled to worship.

One Sheo Ghulam, a pious Hindu and a resident of the said village, had the Thakurdwara constructed during the years 1914-1916, and the idol of Shri Radhakrishnaji ceremoniously installed therein. He was himself in management of the temple and its affairs till 1928 when he died without any issue. On 6th March, 1919, he had executed a will whereby he bequeathed all his lands to the Thakur. The provisions of the will, in so far as they are material, will presently be referred to. The testator had two wives one of whom, Ram Kuar, had predeceased him and the surviving widow, Raj Kuar, succeeded him as Mutawalli in terms of the will and was in management till her death in 1933. Then the first defendant, who is the nephew of Sheo Ghulam, got into possession of the properties as manager of the endowment in accordance with the provisions of the will. The appellant is a distant agnate of Sheo Ghulam, and on the allegation that the first defendant had been mismanaging the temple and denying the rights of the public therein, he moved the District Court of Sitapur for relief under the Religious and Charitable Endowments Act (XIV of 1920), but the Court declined to interfere on the ground that the endowment was private. An application to the Advocate-General for sanction to institute a suit under section 92 of the Code of Civil Procedure was also refused for the same reason. The appellant then filed the suit, out of which the present appeal arises, for a declaration that the Thakurdwara is a public temple in which all the Hindus have a right to worship. The first defendant contested the suit, and claimed that "the Thakurdwara and the idols were private", and that "the general public had no right to make any interference".

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* Civil Appeal No. 250 of 1953. 4th October, 1956.

The Additional Civil Judge, Sitapur, who tried the suit was of the opinion that the Thakurdwara had been built by Sheo Ghulam "for worship by his family", and that it was a private temple. He accordingly dismissed the suit. This judgment was affirmed on appeal by the District Judge, Sitapur, whose decision again was affirmed by the Chief Court of Oudh in second appeal. The learned Judges, however, granted a certificate under section 109 (*c*) of the Code of Civil Procedure that the question involved was one of great importance, and that is how the appeal comes before us.

The question that arises for decision in this appeal whether the Thakurdwara of Shri Radhakrishnaji at Bhadesia is a public endowment or a private one is one of mixed law and fact. In *Lakshmidhar Misra* v. *Ranga Lal*[1], in which the question was whether certain lands had been dedicated as cremation ground, it was observed by the Privy Council that it was "essentially a mixed question of law and fact", and that while the findings of fact of the lower appellate Court must be accepted as binding, its "actual conclusion that there has been a dedication or lost grant is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself". In the present case, it was admitted that there was a formal dedication, and the controversy is only as to the scope of the dedication, and that is also a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and a private endowment to the facts found, and that is open to consideration in this appeal.

It will be convenient first to consider the principles of law applicable to a determination of the question whether an endowment is public or private, and then to examine, in the light of those principles, the facts found or established. The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment. The position is thus stated in Lewin on Trusts, Fifteenth Edition, pp. 15-16:

> "By public must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. To this class belong all trusts for charitable purposes, and indeed public trusts and charitable trusts may be considered in general as synonymous expressions. In private trusts the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time may be, definitely ascertained. . .".

Vide also the observations of Mitter, J. in *Nabi Shirazi* v. *Province of Bengal*[2]. Applying this principle, a religious endowment must be held to be private or public, according as the beneficiaries thereunder are specific persons or the general public or sections thereof.

Then the question is, who are the beneficiaries when a temple is built, idol installed therein and properties endowed therefor? Under the Hindu law, an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. But does it follow from this that it is to be regarded as the beneficial owner of the endowment? Though such a notion had a vogue

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1. (1950) 1 M.L.J. 100 : (1949) L.R. 76 I.A. 271 : I.L.R. 29 Pat. 1 (P.C.).

2. I.L.R. (1942) 1 Cal. 211, 227, 228.

at one time, and there is an echo of it in these proceedings (vide para. 15 of the plaint), it is now established beyond all controversy that this is not the true position. It has been repeatedly held that it is only in an ideal sense that the idol is the owner of the endowed properties. Vide *Prosunno Kumari Debya* v. *Golab Chand Baboo*[1]; *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*[2] and *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*.[3] It cannot itself make use of them, it cannot enjoy them or dispose of them, or even protect them. In short, the idol can have no beneficial interest in the endowment. This was clearly laid down in the Sankrit texts. Thus, in his Bhashya on the Purva Mimamsa, Adhyaya 9, Pada 1, Sabara Swami has the following:

> देवग्रामो, देवक्षेत्रमिति, उपचारमात्रम् । यो यदभिप्रेतं विनियोक्तुमर्हति, तत्तस्य स्वम् ।
>
> न च ग्रामं क्षेत्रं वा यथाभिप्रायं विनियुङ्क्ते देवता । तस्मान्न संप्रयच्छतीति । देवपरिचारकाणां तु ततो भूतिर्भवति, देवतामुद्दिश्य यत् त्यक्तम् ।

"Words such as 'village of the Gods', 'land of the Gods' are used in a figurative sense. That is property which can be said to belong to a person, which he can make use of as he desires. God however does not make use of the village or lands, according to its desires. Therefore nobody makes a gift (to Gods). Whatever property is abandoned for Gods, brings prosperity to those who serve Gods".

Likewise, Medhathithi in commenting on the expression "Devaswam" in Manu, Chapter XI, Verse 26 writes:

> देवानुद्दिश्य, यागादि क्रियार्थं धनं यदुत्सृष्टं तद्देवस्वम्, मुख्यस्य स्वस्वामिसंबन्धस्य, देवानां असंभवात् ।
>
> न हि देवता इच्छया धनं नियुञ्जते । न च परिपालनव्यापारस्तासां दृश्यते ।

"Property of the Gods, Devaswam, means whatever is abandoned for Gods, for purposes of sacrifice and the like, because ownership in the primary sense, as showing the relationship between the owner and the property owned, is impossible of application to Gods. For the Gods do not make use of the property according to their desire nor are they seen to act for protecting the same".

Thus, according to the texts, the Gods have no beneficial enjoyment of the properties, and they can be described as their owners only in a figurative sense (*Gaunartha*), and the true purpose of a gift of properties to the idol is not to confer any benefit on God, but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship. In ***Bhupati Nath Smriti-tirtha*** v. ***Ram Lal Maitra***;[4] it was held on a consideration of these and other texts that a gift to an idol was not to be judged by the rules applicable to a transfer to a 'sentient being', and that dedication of properties to an idol consisted in the abandonment by the owner of his dominion over them for the purpose of their being appropriated for the purposes which he intends. Thus, it was observed by Sir Lawrence Jenkins, C.J., at page 138 that "the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected" and that 'the dedication to a deity' may be "a compendious expression of the pious purposes for which the dedication is designed". *Vide also*

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1. (1875) L.R. 2 I.A. 145, 152.
2. (1904) L.R. 31 I.A. 203.
3. (1924) 49 M.L.J. 30 : L.R. 52 I.A. 245.
4. (1910) I.L.R. 37 Cal. 128.

the observations of Sir Ashutosh Mookerjee at page 155. In *Hindu Religious Endowments Board* v. *Veeraraghavachariar*[1], Varadachariar, J., dealing with this question, referred to the decision in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[2] and observed:

> " As explained in that case, the purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner. This is the sense in which a temple and its endowments are regarded as a public trust ".

When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshippers.

In the light of these principles, we must examine the facts of this case. The materials bearing on the question whether the Thakurdwara is a public temple or a private one may be considered under four heads: (1) the will of Sheo Ghulam, Exhibit A-1, (2) user of the temple by the public, (3) ceremonies relating to the dedication of the Thakurdwara and the installation of the idol with special reference to *Sankalpa* and *Uthsarga,* and (4) other facts relating to the character of the temple.

(1) The will, Exhibit A-1, is the most important evidence on record as to the intention of the testator and the scope of the dedication. Its provisions, so far as they are material, may now be noticed. The will begins with the recital that the testator has two wives and no male issue, that he has constructed a Thakurdwara and installed the idol of Sri Radhakrishnaji therein, and that he is making a disposition of the properties with a view to avoid disputes. Clause 1 of Exhibit A-1 provides that after the death of the testator

> "in the absence of male issue, the entire immovable property given below existing at present or which may come into being hereafter shall stand endowed in the name of Sri Radhakrishnaji, and mutation of names shall be effected in favour of Sri Radhakrishnaji in the Government papers and my wives Mst. Raj Kuer and Mst. Ram Kuer shall be the Mutawallis of the waqf".

Half the income from the properties is to be taken by the two wives for their maintenance during their lifetime, and the remaining half was to "continue to be spent for the expenses of the Thakurdwara". It is implicit in this provision that after the lifetime of the wives, the whole of the income is to be utilised for the purpose of the Thakurdwara. Clause 4 provides that if a son is born to the testator, then the properties are to be divided between the son and the Thakurdwara in a specified proportion, but as no son was born, this clause never came into operation. Clause 5 provides that the Mutawallis are to have no power to sell or mortgage the property, that they are to maintain accounts, that the surplus money after meeting the expenses should be deposited in a safe bank and when funds permit, property should be purchased in the name of Sri Radhakrishnaji. Clause 2 appoints a committee of four persons to look after the management of the temple and its properties, and of these, two are not relations of the testator and belong to a different caste. It is further provided in that clause that after the death of the two wives the committee "*may* appoint my nephew Murlidhar as Mutawalli by their unanimous opinion". This Murlidhar is a divided nephew of the testator and he is the first defendant in this action. Clause 3 provides for filling up of vacancies in the committee. Then finally there is clause 6, which runs as follows:

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[1] A.I.R. 1937 Mad. 750.

[2] (1910) I.L.R. 37 Cal. 128.

> "If any person alleging himself to be my near or remote heir files a claim in respect of whole or part of the waqf property his suit shall be improper on the face of this deed".

The question is whether the provisions of the will disclose an intention on the part of the testator that the Thakurdwara should be a private endowment, or that it should be public. The learned Judges of the Chief Court in affirming the decisions of the Courts below that the temple was built for the benefit of the members of the family, observed that there was nothing in the will pointing "to a conclusion that the trust was a public one", and that its provisions were not "inconsistent with the property being a private endowment". We are unable to endorse this opinion. We think that the will read as a whole indubitably reveals an intention on the part of the testator to dedicate the Thakurdwara to the public and not merely to the members of his family.

The testator begins by stating that he had no male issue. In *Nabi Shirazi* v. *Province of Bengal*,[1] the question was whether a wakf created by a deed of the year 1806 was a public or a private endowment. Referring to a recital in the deed that the settlor had no children, Khundkar, J., observed at p. 217:

> "The deed recites that the founder has neither children nor grandchildren, a circumstance which in itself suggests that the imambara was not to remain a private or family institution".

Vide also the observations of Mitter, J., at page 228. The reasoning on which the above view is based is, obviously, that the word 'family' in its popular sense means children, and when the settlor recites that he has no children, that is an indication that the dedication is not for the benefit of the family but for the public.

Then we have clause 2, under which the testator constitutes a committee of management consisting of four persons, two of whom were wholly unrelated to him. Clause 3 confers on the committee power to fill up vacancies; but there is no restriction therein on the persons who could be appointed under that clause, and conceivably, even all the four members might be strangers to the family. It is difficult to believe that if Sheo Ghulam intended to restrict the right of worship in the temple to his relations, he would have entrusted the management thereof to a body consisting of strangers. Lastly, there is clause 6, which shows that the relationship between Sheo Ghulam and his kinsmen was not particularly cordial, and it is noteworthy that under clause 2, even the appointment of the first defendant as manager of the endowment is left to the option of the committee. It is inconceivable that with such scant solicitude for his relations, Sheo Ghulam would have endowed a temple for their benefit. And if he did not intend them to be beneficiaries under the endowment, who are the members of the family who could take the benefit thereunder after the lifetime of his two wives? If we are to hold that the endowment was in favour of the members of the family, then the result will be that on the death of the two wives, it must fail for want of objects. But it is clear from the provisions of the will that the testator contemplated the continuance of the endowment beyond the lifetime of his wives. He directed that the properties should be endowed in the name of the deity, and that lands are to be purchased in future in the name of the deity. He also provides for the management of the trust after the lifetime of his wives. And to effectuate this intention, it is necessary to hold that the Thakurdwara was dedicated for worship by members of the public, and not merely of his family. In deciding that the endowment was a private one, the learned Judges of the Chief Court failed to advert to these aspects, and we are unable to accept their decision as correct.

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[1] I.L.R. (1942) 1 Cal. 211.

2. In the absence of a deed of endowment constituting the Thakurdwara, the plaintiff sought to establish the true scope of the dedication from the user of the temple by the public. The witnesses examined on his behalf deposed that the villagers were worshipping in the temple freely and without any interference, and indeed, it was even stated that the Thakurdwara was built by Sheo Ghulam at the instance of the villagers, as there was no temple in the village. The trial Judge did not discard this evidence as unworthy of credence, but he held that the proper inference to be drawn from the evidence of P.W. 2 was that the public were admitted into the temple not as a matter of right but as a matter of grace. P.W. 2 was a pujari in the temple, and he deposed that while Sheo Ghulam's wife was doing puja within the temple, he stopped outsiders in whose presence she used to observe purdah, from going inside. We are of opinion that this fact does not afford sufficient ground for the conclusion that the villagers did not worship at the temple as a matter of right. It is nothing unusual even in well-known public temples for the puja hall being cleared of the public when a high dignitary comes for worship, and the act of the pujari in stopping the public is an expression of the regard which the entire villagers must have had for the wife of the founder, who was a pardanashin lady, when she came in for worship, and cannot be construed as a denial of their rights. The learned Judges of the Chief Court also relied on the decision of the Privy Council in *Babu Bhagwan Din* v. *Gir Har Saroon*,[1] as an authority for the position that "the mere fact that the public is allowed to visit a temple or thakurdwara cannot necessarily indicate that the trust is public as opposed to private". In that case, certain properties were granted not in favour of an idol or temple but in favour of one Daryao Gir, who was maintaining a temple and to his heirs in perpetuity. The contention of the public was that subsequent to the grant, the family of Daryao Gir must be held to have dedicated the temple to the public for purpose of worship, and the circumstance that members of the public were allowed to worship at the temple and make offerings was relied on in proof of such dedication. In repelling this contention, the Privy Council observed that as the grant was initially to an individual, a plea that it was subsequently dedicated by the family to the public required to be clearly made out, and it was not made out merely by showing that the public was allowed to worship at the temple "since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away". But, in the present case, the endowment was in favour of the idol itself, and the point for decision is whether it was a private or public endowment. And in such circumstances, proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public. In *Mundancheri Koman* v. *Achuthan*,[1] which was referred to and followed in *Babu Bhagwan Din* v. *Gir Har Saroon*;[2] the distinction between user in respect of an institution which is initially proved to have been private and one which is not is thus expressed:

> " Had there been any sufficient reason for holding that these temples and their endowment were originally dedicated for the tarwad, and so were private trusts, their Lordships would have been slow to hold that the admission of the public in later times, possibly owing to altered conditions, would

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[1] (1940) 1 M.L.J. 1 : (1939) L.R. 67 I.A. 1 : A.I.R 1940 P.C. 7 (P.C.).

[2] (1934) 67 M.L.J. 788 : L.R. 61 I.A. 405 : I.L.R. 58 Mad. 91 : A.I.R. 1934 P.C. 230.

affect the private character of the trusts. As it is, they are of opinion that the learned Judges of the High Court were justified in presuming from the evidence as to public user, which is all one way that the temples and their endowments were public religious trusts".

We are accordingly of opinion that the user of the temple such as is established by the evidence is more consistent with its being a public endowment.

3. It is settled law that an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies, provided the settlor has clearly and unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed, that would be valuable evidence of endowment, but absence of such proof would not be conclusive against it. In the present case, it is common ground that the consecration of the temple and the installation of the idol of Sri Radhakrishnaji were made with great solemnity and in accordance with the Sastras. P.W. 10, who officiated as Acharya at the function has deposed that it lasted for seven days, and that all the ceremonies commencing with *Kalasa Puja* and ending with *Sthapana* or *Prathista* were duly performed and the idols of Sri Radhakrishnaji, Shivji and Sri Hanumanji were installed as ordained in the Prathista Mayukha. Not much turns on this evidence, as the defendants admit both the dedication and the ceremonies, but dispute only that the dedication was to the public.

In the Court below, the appellant raised the contention that the performance of *Uthsarga* ceremony at the time of the consecration was conclusive to show that the dedication was to the public, and that as P.W. 10 stated that *Prasadothsarga* was performed, the endowment must be held to be public. The learned Judges considered that this was a substantial question calling for an authoritative decision, and for that reason granted a certificate under section 109 (c) of the Code of Civil Procedure. We have ourselves read and Sanskrit texts bearing on this question, and we are of opinion that the contention of the appellant proceeds on a misapprehension. The ceremonies relating to dedication are *Sankalpa, Uthsarga* and *Prathista*. *Sankalpa* means determination; and is really a formal declaration by the settlor of his intention to dedicate the property. *Uthsarga* is the formal renunciation by the founder of his ownership in the property; the result whereof being that it becomes impressed with the trust for which he dedicates it. Vide The Hindu Law of Religious and Charitable Trust by B. K. Mukherjea; 1952 Edition, page 36. The formulae to be adopted in *Sankalpa* and *Uthsarga* are set out in Kane's History of Dharmasastras, Volume II, p. 892. It will be seen therefrom that while the *Sankalpa* states the objects for the realisation which the dedication is made, it is the *Uthsarga* that in terms dedicates the properties to the public (*Sarvabhutebyah*). It would therefore follow that if *Uthsarga* is proved to have been performed, the dedication must be held to have been to the public. But the difficulty in the way of the appellant is that the formula which according to P.W. 10 was recited on the occasion of the foundation was not *Uthsarga* but *Prasadothsarga,* which is something totally different. *'Prasada'* is the *'mandira'*, wherein the deity is placed before the final installation or *Prathista* takes place and the Prathista Mayukha prescribes the ceremonies that have to be performed when the idol is installed in the *Prasada*. *Prasadothsarga* is the formula to be used on that occasion, and the text relating to it as given in the Mayukha runs as follows:

> "ततः............प्रासादोत्सर्गं कुर्यात् । तत्र मासपक्षाद्युल्लिख्य, इमं शिलेष्टकादार्वादिनिर्मितं............तत्तद्देवतालोकावातिकामः, कुलद्वयानुग्रहाय, अमुकदेवताप्रीतये, अहमुत्सृजामीति, कुशयवजलानि क्षिप्त्वा, देवं नत्वा, ब्राह्मणान् भोजयेदिति ।"

It will be seen that this is merely the *Sankalpa* without the *Uthsarga,* and there are no words therein showing that the dedication is to the public. Indeed, according to the texts, *Uthsarga* is to be performed only for charitable endowments, like construction of tanks, rearing of gardens and the like, and not for religious foundations. It is observed by Mr. Mandlik in the Vyavahara Mayukha, Part II, Appx. II, p. 339 that "there is no *utsarga* of a temple except in the case of repair of old temples". In the History of Dharmasastras, Volume II, Part II, page 893, it is pointed out by Mr. Kane that in the case of temples the proper word to use is *Prathista* and not *Uthsarga.* Therefore, the question of inferring a dedication to the public by reason of the performance of the *Uthsarga* ceremony cannot arise in the case of temples. The appellant is correct in his contention that if *Uthsarga* is performed the dedication is to the public, but the fallacy in his argument lies in equating *Prasadothsarga* with *Uthsarga.* But it is also clear from the texts that *Prathista* takes the place of *Uthsarga* in dedication of temples, and that there was *Prathista* of Sri Radhakrishnaji as spoken to by P.W. 10, is not in dispute. In our opinion, this establishes that the dedication was to the public.

(4) We may now refer to certain facts admitted or established in the evidence, which indicate that the endowment is to the public. Firstly, there is the fact that the idol was installed not within the precincts of residential quarters but in a separate building constructed for that very purpose on a vacant site. And as pointed out in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan*[1], it is a factor to be taken into account in deciding whether an endowment is private or public, whether the place of worship is located inside a private house or a public building. Secondly, it is admitted that some of the idols are permanently installed on a pedestal within the temple precincts. That is more consistent with the endowment being public rather than private. Thirdly, the puja in the temple is performed by an archaka appointed from time to time. And lastly, there is the fact that there was no temple in the village, and there is evidence on the side of the plaintiff that the Thakurdwara was built at the instance of the villagers for providing a place of worship for them. This evidence has not been considered by the Courts below, and if it is true, that will be decisive to prove that the endowment is public.

It should be observed in this connection that though the plaintiff expressly pleaded that the temple was dedicated "for the worship of the general public", the first defendant in his written statement merely pleaded that the Thakurdwara and the idols were private. He did not aver that the temple was founded for the benefit of the members of the family. At the trial, while the witnesses for the plaintiff deposed that the temple was built with the object of providing a place of worship for all the Hindus, the witnesses examined by the defendants merely deposed that Sheo Ghulam built the Thakurdwara for his own use and "for his puja only". The view of the lower Court that the temple must be taken to have been dedicated to the members of the family goes beyond the pleading, and is not supported by the evidence in the case. Having considered all the aspects, we are of opinion that the Thakurdwara of Sri Radhakrishnaji in Bhadesia is a public temple.

In the result, the appeal is allowed, the decrees of the Courts below are set aside, and a declaration granted in terms of para. 17 (*a*) of the plaint. The costs of the appellant in all the Courts will come out of the trust properties. The first defendant will himself bear his own costs throughout.

Appeal allowed.

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[1] (1875) 15 Ben.L.R. 167, 186.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—S. R. DAS *Chief Jusice*, N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, B. P. CINHA AND S. K. DAS, JJ.

Banaras Ice Factory, Limited .. .. *Appellant**

v.

Its Workmen .. *Respondents.*

Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), *section* 22 (*b*)—*Scope*—"*Discharge*"—*Meaning—Termination of services of all workmen due to* bona fide *closure of business—Permission of Tribunal —If essential.*

The word "discharge" occurring in clause (*b*) of section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, does not include termination of services of all workmen on a real and *bona fide* closure of his business by the employer. The word "discharge" means discharge of a person in a running or continuing business-not discharge of all workmen when the industry itself ceases to exist on a *bona fide* closure of business. There is no occasion for praying for lifting the ban imposed by section 22, when the employer has the right to close his business and *bona fide*, does so ,with the result that the industry itself ceases to exist.

(On appeal by special leave from the judgment and order dated the 30th October, 1952 of the Labour Appellate Tribunal of India, Allahabad in Miscellaneous Case No. C-146 of 1952).

R. R. Biswas, Advocate, for Appellant.

Sukumar Ghose, Advocate, *amicus curiae*, for Respondents.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an appeal by special leave from the judgment and order of the Labour Appellate Tribunal of India at Allahabad dated October 30, 1952. The relevant facts are these. The Banaras Ice Factory, Limited, the appellant before us, was incorporated September 13, 1949, as a private limited company and was carrying on the business of manufacturing ice in the city of Banaras, though its registered office was in Calcutta. The factory worked as a seasonal factory and had in its employment about 25 workmen at all material times. These workmen were employed from the month of March to the month of September every year. The appellant Company got into financial difficulties on account of trade depression, rise in the price of materials and increase in the wages and emoluments of workmen. It tried to secure a loan of Rs. 10,000 from a Bank but met with no success. Thereupon, it decided to close down the factory and on January 15, 1952, a notice was given to its workmen saying that the factory would be closed down with effect from January 17, 1952 and the services of the workmen would not be necessary for two months from that date. The workmen received their wages up to January 16, 1952. On March 18, 1952, they were again taken into service but this temporary closing of the factory gave rise to an industrial dispute and the workmen complained that they were wrongfully laid off with effect from January 17, 1952. The dispute was referred to the

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* C.A. No. 135 of 1955. 28th November, 1956.

Regional Conciliation Officer, Allahabad, for adjudication. In the meantime, that is, on June 6, 1952, the workmen gave a strike notice and as there was no coal in the factory, the appellant also gave a notice of closure on June 12, 1952. A settlement was however arrived at between the parties on June 15, 1952, at the house of the Collector of Banaras. The terms of that settlement, *inter alia*, were: (1) the management would withdraw its notice of closure dated June 12, 1952; (2) the workmen would withdraw their strike notice dated June 6, 1952; (3) there being no coal, the workers would remain on leave for a period of thirty days with effect from June 16, 1952, and would report for duty on July 16, 1952, at 8 A.M. and (4) after the workers had resumed their duty on July 16, 1952, the appellant would not terminate the services of any workmen or lay them off in future without obtaining the prior permission of the Regional Conciliation Officer, Allahabad.

On June 28, 1952, the Regional Conciliation Officer, Allahabad, gave his award in the matter of the industrial dispute between the appellant and its workmen with regard to the alleged wrongful laying off of the workmen from January 17, 1952, to March 18, 1952, referred to above. By his award the Regional Conciliation Officer gave full wages to the workmen for the period in question. On July 16, 1952, none of the workmen reported for duty in accordance with the terms of the agreement referred to above, and on that date the appellant gave a notice to its workmen to the effect that the appellant found it difficult to run the factory and had decided to close it down; the workmen were informed that their services would not be required and would be terminated upon the expiry of thirty days from July 16, 1952. The workmen, it is stated, accepted the notice and took their pay for one month (from July 16, to August 15, 1952) without any protest. Against the award of the Regional Conciliation Officer dated June 28, 1952, the appellant filed an appeal to the Labour Appellate Tribunal on July 25, 1952.

On August 31, 1952 a complaint was made on behalf of the workmen to the Labour Appellate Tribunal under section 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950, hereinafter referred to as the Act. The gravamen of the complaint was that the appellant had contravened the provisions of section 22 of the Act, because the appellant had discharged all the workmen with effect from August 15, 1952, without the permission in writing of the Labour Appellate Tribunal during the pendency before it of the appeal filed on July 25, 1952 against the award of the Regional Conciliation Officer. The Labour Appellate Tribunal dealt with this complaint by its order dated October 30, 1952. Before the Labour Appellate Tribunal it was urged on behalf of the appellant that there was no contravention of section 22, because on July 16, 1952, when the notice of discharge was given by the appellant, no appeal was pending before it, the appellant's appeal having been filed several days later, namely, on July 25, 1952. This contention was not accepted by the Labour Appellate Tribunal on the ground that though the notice of discharge was given on July 16, 1952, the termination of service was to come into operation after one month, that is, from August 15, 1952, on which date the appeal before the Labour Appellate Tribunal was certainly pending. As learned counsel for the appellant has not again pressed this point before us, it is not necessary to say anything more about it.

A second point urged before the Labour Appellate Tribunal was that the appellant had the right to close down the factory, when the appellant found that it was not in a position any longer to run the factory. The agreement of June 15, 1952 did not stand in the appellant's way, as the workmen themselves did not report for duty on July 16, 1952. The closure being a *bona fide* closure, it was not necessary to obtain the permission of the Labour Appellate Tribunal and there was therefore no contravention of section 22 of the Act. The Labour Appellate Tribunal apparently accepted the principle that the appellant had the right to close its business but took the view that permission should have been obtained before the closure. It referred to the agreement of June 15, 1952 and held that though the appellant had the right to close its business, permission was still necessary and in the absence of such permission, the appellant was guilty of contravening clause (*b*) of section 22 of the Act, and directed that the appellant should pay its workmen full wages as compensation for the period of involuntary unemployment up to the date of its award, that is, during the period from August 16, 1952 to October 30, 1952.

Relying on the decision in *J. K. Hosiery Factory* v. *Labour Appellate Tribunal of India*,[1] learned counsel for the appellant has urged three points before us. His first point is that the termination of the services of all workmen on a real and *bona fide* closure of business is not 'discharge' within the meaning of clause (*b*) of section 22 of the Act. His second point is that if the word 'discharge' in clause (*b*) aforesaid includes termination of services of all workmen on *bona fide* closure of business, then the clause is an unreasonable restriction on the fundamental right guaranteed in clause (*g*) of Article 19 (1) of the Constitution. His third point is that, in any view, the Labour Appellate Tribunal was not entitled to grant compensation to the workmen, because section 23 of the Act did not in terms entitle the Labour Appellate Tribunal to pass an order of compensation. We may state here that if the appellant succeeds on the first point, it becomes unnecessary to decide the other two points.

For a consideration of the first point, we must first read sections 22 and 23 of the Act.

> *Section* 22 : " During the period of thirty days allowed for the filing of an appeal under section 10 or during the pendency of any appeal under this Act, no employer shall—
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> (*a*) alter, to the prejudice of the workmen concerned in such appeal, the conditions of service applicable to them immediately before the filing of such appeal, or
>
> (*b*) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such appeal, save with the express permission in writing of the Appellate Tribunal ".
>
> *Section* 23 : " Where an employer contravenes the provisions of section 22 during the pendency of proceedings before the Appellate Tribunal, any employee, aggrieved by such contravention, may make a complaint in writing, in the prescribed manner, to such Appellate Tribunal and on receipt of such complaint, the Appellate Tribunal shall decide the complaint as if it were an appeal pending before it, in accordance with the provisions of this Act and shall pronounce its decision thereon and the provisions of this Act shall apply accordingly ".

The short question before us is whether the word 'discharge' occurring in clause (*b*) of section 22 includes termination of the services of all workmen on a real and *bona fide* closure of his business by the employer. It is true that the word 'discharge' is not qualified by any limitation in clause (*b*). We must, however, take the enactment as a whole and consider section 22 with reference to the provisions of the Industrial Disputes Act, 1947 (Act XIV of 1947) which is in *pari materia* with the Act under our consideration. We have had occasion to consider recently in two cases the general scheme and scope of the Indus-

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1. A.I.R. 1956 All. 498.

trial Disputes Act, 1947. In *Messrs. Burn & Co., Limited, Calcutta* v. *The Workmen*,[1] this Court observed that the object of all labour legislation was firstly to ensure fair terms to the workmen and secondly to prevent disputes between employers and employees so that production might not be adversely affected and the larger interests of the public might not suffer. In the *Pipraich Sugar Mills, Ltd.* v. *The Pipraich Sugar Mills Mazdoor Union*,[2] it was observed—"The objects mentioned above can have their fulfilment only in an existing and not a dead industry". We accepted the view expressed in *Indian Metal and Metallurgical Corporation* v. *Industrial Tribunal*,[3] and *K. N. Padmanabha Ayyar* v. *The State of Madras*,[4] that the provisions of the Industrial Disputes Act, 1947 applied to an existing industry and not a dead industry. The same view was reiterated in *Hariprasad Shivshankar Shukla* v. *A. D. Divelkar*[5] and *The Barsi Ligh Railway Co., Ltd.* v. *K. N. Joglekar*,[6] where we held that retrenchment in clause (*oo*) of section 2 and section 25-F did not include termination of the services of workmen on *bona fide* closure of business.

Turning now to section 22 of the Act, it is clear enough that clause (*a*) applies to a running or existing industry only; when the industry itself ceases to exist, it is otiose to talk of alteration of the conditions of service of the workmen to their prejudice, because their service itself has come to an end. The alteration referred to in clause (*a*) must therefore be an alteration in the conditions of service to the prejudice of the workmen concerned, in an existing or running industry. Similarly, the second part of clause (*b*) relating to punishment can have application to a running or existing industry only. When the industry itself ceases to exist, there can be no question of punishment of a workman by dismissal or otherwise. We are then left with the word 'discharge'. Unqualified though the word is, it must, we think, be interpreted in harmony with the general scheme and scope of the Industrial Disputes Act, 1947. Our attention has been drawn to the definition of 'workman' in clause (*s*) of section 2, which says—

> "........for the purposes of any proceedings under this Act in relation to an industrial dispute (the definition) includes any person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute".

In the said definition clause also, the word 'discharge' means discharge of a person in a running or continuing business—not discharge of all workmen when the industry itself ceases to exist on a *bona fide* closure of business.

The true scope and effect of sections 22 and 23 of the Act were explained in *The Automobile Products of India, Limited* v. *Rukmaji Bala*.[7] It was pointed out there that the object of section 22 was

> "to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation"

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[1] Civil Appeal No. 325 of 1955 decided on October 11, 1956. Since reported in (1957) S.C.J. 38.

[2] Civil Appeal No. 247 of 1954 decided on October 23, 1956. Since reported in (1957) S.C.J. 28.

[3] (1952) 1 M.L.J. 481: A.I.R. 1953 Mad. 98.

[4] (1954) 1 L.L.J. 469.

[5] Civil Appeal No. 103 of 1956 decided on November 27, 1956. Since reported in (1957) S.C.J. 83 at 86.

[6] Civil Appeal No. 105 of 1956 decided on November 27, 1956. Since reported in (1957) S.C.J. 83 at 84.

[7] 1955 S.C.J. 253: (1955) 1 M.L.J. (S.C.) 148: (1955) An. W.R. (S.C.) 148: (1955) 1 S.C.R. 1241.

and the further object was

> "to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of those proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relations between the employer and the workmen".

Those objects are capable of fulfilment in a running or continuing industry only, and not in a dead industry. There is hardly any occasion for praying for permission to lift the ban imposed by section 22, when the employer has the right to close his business and *bona fide* does so, with the result that the industry itself ceases to exist. If there is no real closure but a mere pretence of a closure or it is *mala fide*, there is no closure in the eye of law and the workmen can raise an industrial dispute and may even complain under section 23 of the Act.

For these reasons, we must uphold the first point taken before us on behalf of the appellant. The Appellate Tribunal was in error in holding that the appellant had contravened clause (*b*) of section 22 of the Act. The Appellate Tribunal did not find that the closure of the appellant's business was not *bona fide;* on the contrary, in awarding compensation, it proceeded on the footing that the appellant was justified in closing its business on account of the reasons stated by it. As to the agreement of June 15, 1952, the workmen themselves did not abide by it and the appellant's right cannot be defeated on that ground.

In view of our decision on the first point, it becomes unnecessary to decide the other two points. On the point of construction of section 22 of the Act, we approve of the decision of the Allahabad High Court in *J. K. Hosiery Factory* v. *Labour Appellate Tribunal of India,*[1] but we refrain from expressing any opinion on the other points decided therein and we must not be understood to have expressed our assent, contrary to the opinion expressed by us in the case of the *Automobile Products of India, Limited,*[2] to the view that under section 23 of the Act, it is not open to an Industrial Tribunal to award compensation in an appropriate case.

In the result, the appeal is allowed and the decision of the Labour Appellate Tribunal dated October 30, 1952 is set aside. As the workmen did not appear before us, there will be no order for costs. We are indebted to Mr. Sukumar Ghosh for presenting before us the case of the workmen as *amicus curiae*.

Appeal allowed.

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[1] A.I.R. 1956 All. 498.

[2] 1955 S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148 : (1955) An. W.R. (S.C.) 148 : (1955) 1 S.C.R. 1241.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, B. P. SINHA AND S. K. DAS, JJ.

Mohammad Ghouse .. *Appellant**

v.

The State of Andhra .. *Respondent.*

Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules (1953), *rule* 4 (1) (a)—*Effect on proceedings commenced and enquiry held by Madras High Court under corresponding rule in Madras Civil Services (Disciplinary Proceedings Tribunal) Rule*, 1948—*Retrospective Amendment of Rule* 4 *by G. O. No.* 938 *of April* 11, 1955—*Effect.*

In respect of charges framed on January 15, 1953; May 6, 1953 and April 2, 1953 against the appellant who was a Subordinate Judge, one of the Judges of the Madras High Court was deputed to enquire into those charges. After elaborate enquiry he sent a report on October 20, 1953, that the charge of corruption was made out and with reference to the charges of irregularities he submitted his report on November 10, 1953, in which also he found that the charges were all substantially established. These reports were considered at a meeting of the Judges of the Madras High Court on January 25, 1954, and they decided that the proper punishment was as regards charge of attempting to obtain bribe was dismissal from service and regarding the second charge of various delinquencies, such as delaying judgments *etc.*, was removal from service. Then they passed an order on January 28, 1954, placing the appellant on suspension until further orders and the same was communicated to him on January 30, 1954. On April 28, 1954, the appellant filed in the High Court of Madras a petition under Article 226 of the Constitution for a writ questioning the order of suspension on the ground that under the Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules, 1953, which was published by the Andhra Government on October 22, 1953, with effect from October 1, 1953, enquiry into the conduct of Government servants on a monthly salary of Rs. 150 and above could be held only by a Tribunal to which Government may refer the same, and that therefore, the proceedings of the High Court of Madras after October 1, 1953, culminating in the order of suspension dated January 28, 1954, were without jurisdiction and that the order in question was void, as it was in contravention of Article 311 of the Constitution. [The State of Andhra came into existence on October 1, 1953 but the High Court of Madras continued to have jurisdiction over the Andhra State until July 1954, when a separate High Court was established therefor]. The writ petition of the appellant which was pending in the High Court of Madras was then transferred to the Andhra High Court which dismissed the petition.

On appeal *held*: (1) Read as a whole rule 4 of the Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules does not show an intention to depart from the procedure laid down in the Madras Civil Service Rules. The point however is of academic interest, as the rule in question has subsequently been amended by G.O. No. 938 dated April 11, 1955 and it expressly provides that the amendment shall be deemed to have come into force on October 1, 1953. By the amendment the proviso is omitted and sub-rule (3) inserted providing that cases arising in the Judicial Department shall not be referred to the Tribunal.

(2) The order passed by the High Court on January 28, 1954, is merely one of suspension pending final orders by the Government, and such an order is neither one of dismissal nor of removal from service under Article 311 of the Constitution. The order of suspension falls within rule 13 of the Madras Civil Service (Classification, Control and Appeal) Rules and is perfectly *intra vires*.

Mohammad Ghouse v. *State of Andhra*, (1954) 2 M.L.J. (Andhra) 240 affirmed.

Appeal by special leave from the Judgment and Order, dated the 19th November, 1954 of the Andhra High Court in Writ Petition No. 342 of 1954.

N. C. Chatterji, Senior Advocate (*M. S. K. Shastri* and *Sardar Bahadur*, Advocates, with him) for Appellant.

Porus A. Mehta, T. V. R. Tatachari and *T. M. Sen*, Advocates for Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The appellant was recruited to the Madras Provincial Judicial Service as District Munsif in 1935. In 1949 he was promoted to the office of Subordinate Judge, and on 19th June, 1950, he was posted as Subordinate Judge of Masulipatnam, Krishna District. Among the suits which he tried were O. S. No. 95 of 1946 and O. S. No. 24 of 1949, which were connected, and on 27th July, 1950, arguments were heard therein, and judgment reserved. On 22nd August, 1950, while judgment was still pending, Lingam Sitarama Rao, who was the fifth defendant in both the suits, filed an application in the High Court of Madras for transferring them to some other Court on the ground that the appellant was attempting through his brother to obtain bribe from the parties, and on this application, the High Court passed an order on the same date, staying the delivery of judgment. The suits themselves were eventually transferred to the Court of the Subordinate Judge of Gudivada, and the appellant was also transferred on 16th September, 1950, to the Subordinate Court of Amalapuram in East Godavari District. Thereafter, the High Court started investigation into the allegations made in the affidavit in the stay petition, and as a result of the enquiries and reports received, the following charge was framed against the appellant on 2nd April, 1953:

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* Civil Appeal No. 133 of 1956. 29th November, 1956.

> "That you in or about August, 1950, being at that time Additional Sub-Judge, Masulipatnam, entered into a conspiracy with your brother Md. Riazuddin *alias* Basha for the purpose of obtaining a bribe from the parties to O.S. No. 24 of 1949 and 95 of 1946 on the file of your Court, and that, in pursuance of the conspiracy, the said Md. Riazuddin at Vijayawada attempted between 11th August, 1950 and 13th August, 1950 to obtain a bribe from Lingam Satya Narayana Rao and his son Lingam Seetarama Rao (the 5th defendant in both the above suits).
>
> You are hereby required within 15 days of the receipt by you of this proceeding (1) to submit a written statement of your defence and to show cause why disciplinary action should not be taken against you in respect of the above charge, and
>
> (ii) to state whether you desire an oral enquiry to be held or only to be heard in person".

The appellant filed his written statement in answer to the charge on 22nd June, 1953.

Meantime, complaints had also been received by the High Court that the appellant had committed serious irregularities in the discharge of his official duties in the Sub-Court, Amalapuram, such as that he had delayed delivering judgments in the suits and appeals for an unreasonable time, that he had made false returns to the District Court, and that to cover his defaults, he had altered the records of the Court so as to be consistent with those returns. Charges were framed with reference to these irregularities on 15th January, 1953, and further charges relating to the same matter were framed on 6th May, 1953, to all of which he filed his explanation on 22nd June, 1953.

One of the Judges of the High Court of Madras, Balakrishna Ayyar, J., was deputed to enquire into these charges, and after making an elaborate enquiry in which several witnesses including the appellant were examined, he sent a report on 20th October, 1953, that the charge of corruption was made out, and he concluded as follows:

> "Therefore, I find the charge proved. What punishment should be imposed on Mr. Ghouse can be decided only after he has been heard in that regard, but, at this stage, I am inclined to take the view that he should be dismissed from service".

With reference to the charges of irregularities, etc., Balakrishna Ayyar J., submitted his report on 10th November, 1953, in which also he found that the charges were all substantially established, and he concluded as follows:

> 'In the result, I find Mr. Ghouse guilty of the charges framed to the extent already indicated.
>
> In respect of another charge against Mr. Ghouse that I enquired into I expressed the view that he should be dismissed from service. In view of that no further recommendation for punishment in respect of these charges is necessary. Certain observations, however, may not be out of order. A judicial officer who delays judgments, in the absence of special or extenuating circumstances, furnishes evidence of his own incompetence. But a judicial officer who systematically sends false returns is guilty of moral turpitude. If in addition he instructs members of his office to make false entries in the records of the Court he would be guilty of even more blameworthy conduct. One would hardly desire to keep such persons in service".

These reports were considered at a meeting of the Judges of the Madras High Court on 25th January, 1954, and they decided that "the proper punishment to be awarded to the officer as regards the two counts are (1) regarding the first charge of bribery, dismissal from service and (2) regarding the second charge of various delinquencies, such as delaying judgments, etc., removal from service". Then they passed an order on 28th January, 1954, placing the appellant on suspension until further orders, and the same was communicated to him on 30th January, 1954.

On 28th April, 1954, the appellant filed in the High Court of Madras a petition under Art. 226 of the Constitution, for a writ quashing the order of suspension dated 28th January, 1954, on the grounds, firstly, that under the Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953, which had been published by the Andhra Government on 22nd October, 1953, with effect from 1st October, 1953, enquiry into the conduct of Government servants on a monthly salary of Rs. 150 and above could be held only by a Tribunal to which the Government might refer the same, and that, therefore, the proceedings of the High Court of Madras after 1st October, 1953, culminating in the order of suspension dated 28th January, 1954, were without jurisdiction, and, secondly, that the order in question was void, as it was in contravention of Article 311 of the Constitution. It must be mentioned that the State of Andhra had come into existence on 1st October, 1953, but that the High Court of Madras continued to have jurisdiction over the Andhra State until July, 1954, when a separate High Court was established therefor. The writ petition which was pending in the High Court of Madras was then transferred to the Andhra High Court.

At the hearing, the only contention that would appear to have been pressed by the appellant was that by reason of the Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953, coming into force on 1st October, 1953, it was only a Tribunal as provided in Rule 4 (1) (*a*) of those Rules that could enquire into the charges, and that the proceedings in the High Court of Madras subsequent thereto were without jurisdiction. In rejecting this contention, the learned Judges observed that though Rule 4 of the Andhra Civil Services Rules differed in some respects from the corresponding rule of the Madras Civil Services Rules, 1948, the differences were of an unsubstantial character, and were due more to inexpert drafting than to any deliberate intention to effect a change in the Madras Rules. They further held that if the Rule in question was intended to affect the jurisdiction of the High Court to hold an enquiry into the conduct of a subordinate judicial officer, it would be in contravention of Articles 227 and 235 of the Constitution, which vested in the High Court the control and superintendence of all the Courts in the State. In the result, they dismissed the application. The matter now comes before this Court in appeal under Article 136 of the Constitution.

Before us, the appellant pressed both the grounds which were raised by him in his application under Article 226. On the question whether by reason of the Andhra Civil Services Rules coming into operation with effect from 1st October, 1953, the High Court had ceased to have jurisdiction to proceed with the matter it is necessary first to refer to the relevant rules. Rule 4 of the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948, which was the rule in force when the enquiry against the appellant was started, runs as follows:

> 4. "The Government may, subject to the provisions of rule 5, refer to the Tribunal :—
>
> (*a*) Cases relating to Government servants on a monthly salary of Rs. 150 and above, in respect of matters involving corruption on the part of such Government servants in the discharge of their official duties.

(*b*) All appeals to the Government from Government servants against disciplinary orders passed by heads of departments and other competent authorities on charges of corruption; and

(*c*) any other case or class of cases which the Government consider, should be dealt with by the Tribunal:

Provided that cases arising in the Judicial Department and against Government servants in the subordinate ranks of police forces of the rank of Sub-Inspector and below shall not be referred to the Tribunal ".

The corresponding rule in the Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953, which came into operation from 1st October, 1953, is as follows:

4. (1) " The Government shall subject to the provisions of rule 5, refer the following cases to the Tribunal, namely :—

(*a*) Cases relating to Government servants on a monthly salary of Rs. 150 and above in respect of matters involving corruption on the part of such Government servants in the discharge of their official duties ; and

(*b*) All appeals or petitions to the Government against orders passed on charges of corruption and all disciplinary cases in which the Government propose to revise the original orders passed on such charges :

Provided that it shall not be necessary to consult the Tribunal :

(i) in any case in which the Tribunal has, at any previous stage, given advice in regard to the order to be passed and no fresh question has thereafter arisen for determination, or,

(ii) Where the Government propose to pass orders rejecting such appeal or petition.

2. The Government may, subject to the provisions of rule 5, also refer to the Tribunal any other case or class of cases which, they consider should be dealt with by the Tribunal :

Provided that the following cases shall not be referred to the Tribunal, namely :—

(i) Cases arising in the Judicial Department ;

(ii) Cases arising against the Government servants in the Subordinate ranks of the police forces of the rank of Sub-Inspector and below, unless the cases are against them together with officers of higher ranks ".

The argument of the appellant is that whereas under the proviso to rule 4 of the Madras Civil Services Rules, enquiries against subordinate judicial officers could not be referred to a Tribunal, under rule 4 (1) (*a*) of the Andhra Civil Services Rules it was obligatory on the part of the Government to refer the cases of all Government servants drawing a monthly salary of Rs. 150 and above to a Tribunal. According to the appellant, the result of this change was that such enquiry as was held after 1st October, 1953, by the High Court and all orders passed by it thereafter were bad, and that he had a right to have his case referred to and determined by the Tribunal in accordance with rule 4 (1) (*a*). There has been some argument before us as to whether the concluding proviso in Rule 4 of the Andhra Civil Services Rules qualifies both sub-rules (1) and (2) or only sub-rule (2). While, on the one hand, there is force in the contention of the appellant that having regard to its setting, the proviso should more properly be read as qualifying sub-rule (2), we are inclined to agree with the learned Judges of the High Court that, read as a whole, the Rule does not show an intention to depart from the procedure laid down in the Madras Civil Services Rules. The point, however, is one of academic interest, as the Rule in question has subsequently been amended by G. O. No. 938, dated 11th April, 1955, and it expressly provides that the amendment shall be deemed to have come into force on 1st October, 1953. That amendment is as follows:

" In rule 4 of the said rules, the proviso occurring after sub-rule (2) shall be omitted, and in lieu thereof, the following sub-rule shall be inserted, namely :—

(3) Notwithstanding anything contained in sub-rule (i) or sub-rule (2), the following cases shall not be referred to the Tribunal namely :—

(i) cases arising in the Judicial Department ; and

(ii) cases arising against Government servants in the subordinate ranks of the Police forces of the rank of Sub-Inspector and below, unless the cases are against them together with officers of higher ranks".

By reason of this amendment, which is expressly retrospective in character, the main ground of objection on which the application of the appellant was founded, is no longer tenable. In view of this conclusion, it becomes unnecessary to consider the contention of the respondent that rule 4 of the Andhra Civil Services Rules could not, in any event, apply to enquiries which had been validly initiated previously thereto.

It was next contended on behalf of the appellant that as the authority which appointed him was the Governor of the Province, it was only that authority that could dismiss or remove him from service, and that the order of suspension made by the High Court on 28th January, 1954, was in contravention of Article 311 of the Constitution, and was, in consequence, bad. This contention does not appear to have been pressed in the High Court, and is, moreover, without substance. The facts are that Balakrishna Ayyar, J., sent his report on the enquiry into the charges against the appellant, and expressed his opinion that he should be dismissed or removed from service. The High Court approved of it, and passed an order on 28th January, 1954, suspending him until further orders. The report was then sent to the Government for action, and, in fact, the Andhra Government has issued a notice to the appellant on 12th August, 1954, to show cause why he should not be dismissed or removed from service. Thus, it is the appropriate authority under Article 311 that proposes to take action against the appellant, and it is for that authority to pass the ultimate order in the matter. The order passed by the High Court on 28th January, 1954, is merely one of suspension pending final orders by the Government, and such an order is neither one of dismissal nor of removal from service within Article 311 of the Constitution. It was also argued that the High Court had no authority under the rules to suspend a judicial officer pending final orders of the Government. But under Rule 13 of the Madras Civil Services (Classification, Control and Appeal) Rules, it is the High Court of Judicature at Madras that is constituted as the authority which may impose suspension pending enquiry into grave charges under Rule 17 (*e*) against the Members of the State Judicial Service. The order in question, therefore, falls within this rule, and is perfectly *intra vires*.

It was lastly contended for the appellant that even if the High Court could hold a preliminary enquiry into the conduct of a judicial officer, it had no jurisdiction to decide the matter finally, that the findings given by Balakrishna Ayyar, J., should not be held to conclude the question against the appellant, and that the Government was bound to hold a fresh enquiry and decide for itself whether the charges were well-founded. No such question was raised in the petition or in the High Court, and we must, therefore, decline to entertain it.

In the result, the appeal is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—B. JAGANNADHADAS, B. P. SINHA AND S. J. IMAM, JJ.

P. Lakshmi Reddy .. *Appellant**

v.

L. Lakshmi Reddy .. *Respondent.*

Adverse possession—Co-heir claim of—Requisites of—Receiver's possession—If can be tacked on.

Practice—Supreme Court—Appeal by special leave—Interference with inference of ouster based on facts and circumstances—Desirability.

The suit giving rise to the appeal in the Supreme Court by special leave was filed in October, 1941; it was returned for presentation to proper Court in November, 1942 and presented to the trial Court on 2nd December, 1942. The plaintiff claimed he and the second defendant were reversioner, of the same degree as *H* and *H* in an action with his consent filed the suit O. S. No. 24 of 1928 and not possession of the properties in January, 1930, from the receiver appointed in 1928 pending action, after the decree in his favour in 1929 and he was in joint enjoyment of the same and sought a declaration of title of his one third share and prayed for partition and possession of the same.

The trial Court found *H* claimed in the prior action as the sole nearest agnate of *V*, in his individual capacity, he got possession as such and continued in possession, that he did not give any profits to plaintiff and that the plaintiff and second defendant had been excluded from participation of profits to their knowledge since 1930 and dismissed the suit.

The District Court on appeal allowed the claim holding the plaintiff was entitled to the benefit of S. 14, Limitation Act and the suit deemed as filed in 1941 was within time. It found on remand by the High Court in second appeal that the plaintiff had nothing to do with the institution and conduct of O.S. No. 24 of 1928 and he never had any joint enjoyment with *H*. No finding was given as to whether non-participation of the profits was in the nature of exclusion to the knowledge of the plaintiff and the second defendant. The High Court confirmed the decree of the District Court.

On appeal by special leave to the Supreme Court *held* (1) Possession of a co-heir is presumed to be possession on the basis of joint title of the co-heirs.

Adverse possession of one co-heir as against others cannot be established by the mere fact of his sole possession and enjoyment of the properties. Ouster or exclusion of the others must be made out. To constitute ouster there must be evidence of open assertion of hostile title coupled with exclusive possession and that to the knowledge of the others. When one heir takes and maintains notorious exclusive possession in assertion of hostile title and continues such possession for a considerable length of time and the excluded heir takes no steps it has been held adverse possession and ouster could be inferred.

(2) Where the facts and circumstances are such that a Court of fact might well have inferred ouster it is not desirable for the Supreme Court sitting on an appeal in special leave to decide the case on that ground.

(3) The rule of possession of a receiver being that of the successful party, cannot be pushed to the extent of enabling a person initially not in possession to claim the tacking in of receiver's possession to his subsequent adverse possession. Adverse possession cannot commence until he obtain actual possession with the requisite animus. It may be different when the defendant holding adversely prior to suit is dispossessed by the receiver but subsequently he succeeds and gets back the possession.

(On appeal by special leave from the judgment and decree dated the 3rd day of December, 1951 of the High Court of Judicature at Madras in Second Appeal No. 766 of 1947 against the decree dated 19th day of November, 1946 of the District Court of Anantapur in Appeal No. 130 of 1945 arising out of the decree dated the 31st day of January, 1945, of the Court of Subordinate Judge Anantapur, in Original Suit No. 10 of 1944).

M. C. Setalvad, Attorney-General of India (*P. Ram Reddy, K. Sundararajan* and *M. S. K. Aiyangar,* Advocates, with him), for Appellant.

C. K. Daphtary, Solicitor-General of India (*K. R. Chaudhury,* Advocate, with him), for Respondent.

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* C.A. No. 178 of 1955. 5th December, 1956.

The Judgment of the Court was delivered by

Jagannadhadas, J.—The plaintiff in the action out of which this appeal arises brought a suit for declaration of his title to a one-third share in the suit properties and for partition and recovery of that share. The suit was dismissed as having been barred by limitation and adverse possession. On appeal the District Judge reversed the decision and decreed the suit. The High Court maintained the decree of the District Judge on second appeal. Hence this appeal before us on special leave by the first defendant in the action, who is the appellant before us. The main question that arises in the appeal is whether the plaintiff has lost his right to a one-third share in the suit property by adverse possession.

The property in suit belonged to one Venkata Reddy. He died as an infant on August 25, 1927. At that time, the properties were in the possession of the maternal uncles of the father of the deceased Venkata Reddy. One Hanimi Reddy, an agnatic relation of Venkata Reddy, filed a suit O.S. No. 26 of 1927 for recovery of the properties from the said maternal uncles and obtained a decree therein on March 15, 1929. A Receiver was appointed for the properties in February, 1928, during the pendency of the suit and presumably the properties were in his possession. This appears from the decree which shows that it directed the Receiver to deliver possession to the successful plaintiff in that suit. Hanimi Reddy obtained actual possession of these properties on January 20, 1930, and continued in possession till he died on August 16, 1936. The first defendant in the present action who is the appellant before us is a son of the brother of Hanimi Reddy and came into possession of all the properties as Hanimi Reddy's heir. The respondent before us is the plaintiff. The present suit was brought on the allegation that the plaintiff and the second defendant in the suit, his brother, were agnatic relations of Venkata Reddy, of the same degree as Hanimi Reddy and that all the three were equal co-heirs of Venkata Reddy and succeeded to his properties as such on his death. It was alleged that though Hanimi Reddy filed the prior suit and obtained possession of the properties thereunder, he did so as one of the co-heirs, with the consent of the plaintiff and the second defendant and that he was enjoying the properties jointly with the plaintiff and his brother as tenants in common but that the first defendant, who came into possession on the death of Hanimi Reddy denied the title of the plaintiff and his brother in or about the year 1940. The plaint in the present action was filed originally in the District Munsif's Court on October 23, 1941, and was ordered to be returned for presentation to the District Judge's Court on November 30, 1942. It was actually re-presented in that Court on December 2, 1942. One of the questions raised in the suit was that the suit was barred by limitation on the ground that it must be taken to have been instituted not on October 23, 1941, but on December 2, 1942. This plea was upheld by the trial Court. On first appeal the District Judge held that the plaintiff is entitled to the benefit of section 14 of the Limitation Act and that the suit must be taken as having been instituted on October, 23, 1941, and is, therefore, in time. He accordingly decreed the suit. In the High Court the question as to whether the plaintiff was entitled to the benefit of section 14 of the Limitation Act, though raised, was not finally decided. It was held that the possession of Hanimi Reddy was not adverse to the plaintiff and that accordingly he was entitled to the decree as prayed for. The question as to the non-availability of the benefit of section 14 of the Limitation Act to the plaintiff in the present suit has not been urged before us and the finding of the District Judge that the plaint must be taken to have been validly presented on October 23, 1941, stands. That date must, therefore, be taken to be the commencement of the action for the purposes of this appeal. It will be noticed that this date is more than fourteen years from the date when the succession opened to the properties of Venkata Reddy on August 25, 1927, but is less than twelve years after Hanimi Reddy obtained actual possession in execution of his decree on January 20, 1930. The contention of the learned Attorney-General for the appellant-first defendant is that the possession of Hanimi Reddy was adverse, that the plaintiff as well as the second defendant lost their right by the adverse possession of Hanimi Reddy and his successor, the first defendant, and that for this purpose not only the period from January 20, 1930, up to October 23, 1941, is to be counted but also the prior period during the pendency of Hanimi Reddy's suit when the Receiver was in possession of the suit properties. It is the validity of these two parts of the argument which has to be considered.

It will be convenient to consider in the first instance whether or not the possession of Hanimi Reddy from January 20, 1930, up to the date of his death in 1936 was adverse to his co-heirs. The facts relevant for this purpose are the following. At the date when Venkata Reddy died his properties were in the custody of the two maternal uncles of his father. Hanimi Reddy filed his suit on the allegation, as already stated above, that he was the nearest agnatic relation alive of the deceased minor Venkata Reddy and as his next rightful heir to succeed to *all* the estate, movable and immovable, of the said minor, set forth in the schedules thereto. He appended a genealogical tree to his plaint which showed his relationship to Venkata Reddy through a common ancestor and showed only the two lines of himself and Venkata Reddy. Plaintiff and the second defendant belong to another line emanating from the same common ancestor but that line was not shown and the plaintiff and second defendant were ignored. The first defendant in the present suit did not admit the relationship of plaintiff and second defendant in his written statement. He disputed that the father of the plaintiff and second defendant was descended from the common ancestor either by birth or by adoption, as shown in the genealogical table attached to the present plaint. It is possible that this may have been the reason for Hanimi Reddy ignoring the plaintiff and the second defendant in his suit. However this may be, at the trial in this suit it was admitted, that the plaintiff and the second defendant are the agnatic relations of Venkata Reddy of the same degree as Hanimi Reddy. The defendants in the earlier suit who were in possession on that date claimed to retain possession on behalf of an alleged illatom son-in-law, (of Venkata Reddy's father) a son of the second defendant therein. It may be mentioned that in that part of the country (Andhra) an illatom son-in-law is a body incorporated into the family with a view to give a daughter in marriage and is customarily recognised as an heir in the absence of a natural-born son. This claim appears to have been negatived and the suit was decreed. During the pendency of the suit a Receiver was appointed in February, 1928. He presumably took possession though the date of his taking possession is not on the record. The decree in that suit dated March 15, 1929, is as follows:

> "This Court doth order and decree that plaintiff do recover possession of immovable property and movables in the possession of the Receiver".

It is in the evidence of the first defendant himself as D.W. 1 that the properties were taken possession of by Hanimi Reddy on January 20, 1930. The plaintiff examined himself as P.W. 1 to substantiate the case as set out in his plaint that he and the second defendant and Hanimi Reddy were enjoying the properties jointly as tenants in common. The relevant portion of his evidence is as follows:

> "Annu Reddy (Hanimi Reddy) uncle of defendant 1, and myself filed O.S. No. 26 of 1927 District Court, Anantapur—same as O.S. No. 24 of 1928, Sub-Court, Anantapur—for the properties of the deceased Vankata Reddy. As Hanimi Reddy was the eldst member,he was attending to the

conduct of that suit. I was also coming to Court along with him. The suit ended in our favour. Hanimi Reddy took possession through Court after the decree in the year, 1930. Since then both Hanimi Reddy and myself have been in joint possession and enjoyment of the same ".

In cross-examination he said as follows:

> " I told Hanimi Reddy that I would also join him as a party in O.S. No. 24 of 1928. He said there was no need for me to join and that he would give my share to me............I did not file any application to be impleaded as a defendant..............I have nothing in writing to show that Hanimi Reddy was giving me any produce from the suit lands ".

The first defendant filed the plaint, judgment and decree in Hanimi Reddy's suit as also pattas, cist receipts and lease deeds taken by Hanimi Reddy in his time. With reference to this evidence the trial Court found as follows:

> "The documents filed on behalf of the first defendant completely establish that Hanimi Reddy filed the suit in his individual capacity and obtained possession thereof. There is nothing to indicate hat either the plaintiff or the second defendant took any interest in those proceedings.......... There is no evidence of Hanimi Reddy having given any produce to the plaintiff or to the second defendant..........The plaintiff and the second defendant have been excluded from participation of profits to their knowledge since 1930 ".

The learned District Judge found on appeal (when the same was remanded to him for a finding by the High Court) as follows:

> "I have no hesitation in holding that the plaintiff had nothing to do with the institution or conduct of the suit O.S. No. 24 of 1928 on the file of the Sub-Court of Anantapur, and that he never had any actual joint enjoyment of suit properties with the late D. Hanimi Reddy or the first defendant.

He has not given a finding as to whether the non-participation of the profits by the plaintiff and the second defendant was in the nature of exclusion to their knowledge. But there are some admitted and relevant facts brought out in evidence which are significant. The present evidence as well as the plaint in the earlier suit of 1927 show clearly that all the parties including Hanimi Reddy were residents of village Mamuduru. All the suit properties are situated in that village itself, as appears from the schedules to the plaint in the earlier suit. Hanimi Reddy and the plaintiff were fairly closely related as appears from the plaintiffs admission as follows:

> "My brother-in-law who is also the nephew of Hanimi Reddy was staying with Hanimi Reddy My father-in-law and defendant No. 1's father-in-law is the same ".

On these facts the question that arises is whether, in law, the possession of Hanimi Reddy from January 20, 1930, onwards was adverse to the plaintiff and the second defendant.

Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. (See *Secretary of State for India* v. *Debendra Lal Khan*.[1]) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See *Radhamoni Debi* v. *Collector of Khulna*.[2]) But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Cores* v. *Appuhamy*.[3]) It is a settled rue of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai* v. *Jeevarathnammal*[1] quotes, apparently with approval, a passage from *Culley* v. *Deod Taylerson*[2] which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also *Govindrao* v. *Rajabai*[3].) It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.

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[1] (1933) 66 M.L.J. 134 : 6 I.A. 78, 82.

[2] (1900) L.R. 27 I.A. 136, 140.

[3] L.R. (1912) A.C. 230.

In the present case there can be no doubt that Hanimi Reddy obtained sole possession of the suit properties after the death of Venkata Reddy on the basis of an action against third parties in which he claimed to be the sole nearest male agnate having title to *all* the properties. After obtaining possession he was in continuous and undisputed possession of the properties till his death enjoying all the profits thereof. No doubt in an ordinary case such possession and enjoyment has to be attributed to his lawful title, he being one of the co-heirs. But the plaint in the suit of 1927 and the decree therein, render it reasonably clear that he filed the suit and obtained possession on the basis of his having exclusive title ignoring his co-heirs. It is urged that knowledge of the assertion of such exclusive title averred in a plaint cannot be imputed to other co-heirs who are not parties to the suit. But in this case it is not difficult on the evidence to say that the plaintiff and the second defendant must have been fully aware, at the time, of the nature of the claim made by Hanimi Reddy in the prior litigation and on the basis of which he obtained possession. That knowledge is implicit in the very case that they have put forward in the present plaint. Their case is that the prior suit was brought by Hanimi Reddy with the consent of the plaintiff and the second defendant and on their behalf. No doubt that specific case has been found against them and that finding is *res judicata* between the parties. But there is no reason why the admission as to the knowledge of the nature of the litigation and the contents of the plaint which such a case necessarily implies should not be attributed at least to the present plaintiff. It appears reasonable to think that the plaintiff being unable to explain his inaction for over fourteen years after the death of Venkata Reddy has been constrained to put forward a false case that the prior suit by Hanimi Reddy was with his consent and on his behalf. It is significant that the plaintiff, has remained silent without asserting his right during Hanimi Reddy's life time, and comes forward with this suit after his death, rendering it difficult to ascertain whether the fact of Hanimi Reddy completely ignoring the existence of the plaintiff and the second defendant as co-heirs was not in denial of their relationship and consequently of their title as co-heirs to their knowledge. The fact that even so late as in the written-statement of the first defendant relationship is denied may be indicative as to why Hanimi Reddy ignored the plaintiff and the second defendant and why they remained silent. The learned Judges of the High Court thought that there was nothing to show that Hanimi Reddy was aware that plaintiff and second defendant had any rights in the properties as co-heirs. This assumption is contrary to the admission of mutual knowledge of each other's rights implicit in the plaintiff's case that Hanimi Reddy brought his suit with the consent of the plaintiff. In such circumstances and especially having regard to the fact that both the plaintiff and Hanimi Reddy were living in the same village and the plaintiff has put forward a false explanation to account for his inaction, a Court of fact might well have inferred ouster. Sitting on an appeal in special leave, however, we do not feel it desirable to decide the case on this ground. We, therefore, proceed to consider the further question that arises, in the case, *viz.*, whether the Receiver's possession can be tacked on to Hanimi Reddy's possession on the assumption that Hanimi Reddy's possession on and from January 20, 1930, was adverse to the plaintiff.

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[1] (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 : A.I.R. 1919 P.C. 44, 47.

[2] 3 P. & D. 539 : 52 R.R. 566.

[3] (1931) 60 M.L.J. 386: L.R. 58 I.A. 106 : A.I.R. 1931 P.C. 48.

The learned Attorney-General urges that prior possession of the Receiver pending the suit must be treated as possession on behalf of Hanimi Reddy with the animus of claiming sole and exclusive title disclosed in his plaint. In support of this contention he relies on the well-known legal principle that when a Court takes possession of properties through its Receiver, such Receiver's possession is that of all the parties to the action according to their titles. (*See* Kerr on Receivers (12th Edition) page 153). In Woodroffe on the Law relating to Receivers (4th Edition) at page 63 the legal position is stated as follows:

> "The Receiver being the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law in *gremio legis*, for the benefit of whoever may be ultimately determined to be entitled thereto".

But does this doctrine enable a person who was *not* previously in possession of the suit properties, to claim that the Receiver must be deemed to have taken possession adversely to the true owner, on his behalf, merely because he ultimately succeeds in getting a decree for possession against the defendant therein who was previously in possession without title. A Receiver is an officer of Court and is not a particular agent of any party to the suit, notwithstanding that in law his possession is ultimately treated as possession of the successful party on the termination of the suit. To treat such Receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrong-doing to the Court and its officers. The doctrine of Receiver's possession being that of the successful party cannot, in our opinion, be pushed to the extent of enabling a person who was initially out of possession to claim the tacking on of Receiver's possession to his subsequent adverse possession. The position may conceivably be different where the defendant in the suit was previously in adverse possession against the real owner and the Receiver has taken possession from him and restores it back to him on the successful termination of the suit in his favour. In such a case the question that would arise would be different, *viz.*, whether the interim possession of the Receiver would be a discontinuance or abandonment of possession or interruption of the adverse possession. We are not concerned with it in this case and express no opinion on it.

The matter may be looked at from another point of view. It is well-settled that limitation cannot begin to run against a person unless at the time that person is legally in a position to vindicate his title by action. In Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI, at page 159, quoting from Angell on Limitation, this principle is stated in the following terms:

> "An *adverse* holding is an actual and exclusive appropriation of land commenced and continued *under a claim of right*, either under an *openly avowed* claim, or under a *constructive* claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession. (Angell, sections 390 and 398). It is the *intention* to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a *cause of action* which constitutes adverse possession."

Consonant with this principle the commencement of adverse possession, in favour of a person, implies that that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus. In the leading case of *Agency Company* v. *Short*[1] the Privy Council points out that there is discontinuance of adverse possession when possession has been abandoned and gives as the reason therefor, at page 798, as follows:

> "There is no one against whom he (the rightful owner) can bring his action."

It is clearly implied therein that adverse possession cannot commence without actual possession which can furnish cause of action. This principle has been also explained in *Dwijendra Narain Roy* v. *Joges Chandra De*[2] at page 609 by Mookerjee, J. as follows:

> "The substance of the matter is that time runs when the cause of action accrues, and a cause of action accrues when there is in existence a person who can sue and another who can be sued......... The cause of action arises when and only when the aggrieved party has the right to apply to the proper Tribunals for relief. The statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result."

In the present case, the co-heirs out of possession such as the plaintiff and the second defendant were not obliged to bring a suit for possession, against Hanimi Reddy until such time as Hanimi Reddy obtained actual possession. Indeed during the time when the Receiver was in possession, obviously, they could not sue him for possession to vindicate their title. Nor were they obliged during that time to file a futile suit for possession either against Hanimi Reddy or against the defendants in Hanimi Reddy's suit when neither of them was in possession. It appears to us, therefore, that the adverse possession of Hanimi Reddy, if any, as against his co-heirs could not commence when the Receiver was in possession. It follows that assuming that the possession of Hanimi Reddy from 20th January, 1930, was in fact adverse and amounted to ouster of the co-heirs such adverse possession was not adequate in time by 23rd October, 1941, the date of suit to displace the title of the plaintiff. It follows that the plaintiff-respondent before us, is entitled to the decree which he has obtained and that the decision of the High Court is, in our view, correct though on different grounds. It may be mentioned that objection has been raised on behalf of the respondent before us that the question of tacking on Receiver's possession was not in issue in the lower Courts and should not be allowed to be raised here. In the view we have taken it is unnecessary to deal with this objection.

In the result the appeal is dismissed with costs.

Appeal dismissed.

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[1] (1888) L.R. 13 A.C. 793.

[2] A.I.R. 1924 Cal. 600.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, B. P. SINHA AND S. K. DAS, JJ.

Punjab National Bank Ltd. .. *Appellant**

v.

Sri Ram Kanwar, Industrial Tribunal, Delhi and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947) as amended by Act (XLVIII of 1950), section 11 (7)—Interpretation and scope of—Costs, if include the travelling and halting allowance of a party—Power of Tribunal to direct payment of costs in advance in a pending proceeding.

The expression "costs of proceeding" in section 11 (7), Industrial Disputes Act, means cost of the entire proceeding as determined on its conclusion and not costs in a pending proceeding nor costs to be incurred in future by a party; "costs incidental to any proceeding" means costs of interlocutory application, etc.—such costs as has been determined thereon at the conclusion of the hearing. Neither has any reference to costs payable in advance; far less do they refer to halting and travelling allowance of a party.

This sub-section gives a discretion to the Tribunal and it has full power to determine by and to whom and to what extent, subject to what conditions if any, the costs are to be paid. The discretion in a judicial discretion to be exercised according to rules of justice and reason. It is a negation of justice and reason to direct a party to pay in advance the costs of the other, irrespective of the final result of the proceeding.

Certain Banking Companies v. *Their Workmen*, (1952) 2 L.L.J. 54, Comm. and Overruled.

Associated Cement Companies Ltd., Dwarka Cement Works, Dwarka v. *Workmen Employed under it*, (1953) 1 C.R. (Bom.) 292, 307; *Jeevana Textile Mills* v. *Their Workmen*, (1956) 1 L.L.J. 423 and *United Commercial Bank Case*, (1952) 2 L.L.J. 1, Approved.

Quaere.—Whether the Indsutrial Tribunal becomes *functus officio* with the submission of the award?

(On Appeal by Special Leave from the Order, dated the 17th April, 1954, of Shri Ram Kanwar, Industrial Tribunal, Delhi, made on an application filed on the 17th April, 1954).

Ram Lal Anand with *Naunit Lal*, Advocate, for Appellant.

Y. Kumar, for Respondent No. 13.

The Judgment of the Court was delivered by

S. K. Das, J.—The Punjab National Bank Ltd., is the appellant before us. Shorn of all details not necessary for our purpose, the facts are these. By its Order No. LR-100 (98) dated 2nd September, 1953, the Government of India, Ministry of Labour, appointed Shri Ram Kanwar, respondent No. 1, as the Industrial Tribunal for the adjudication of a dispute which had arisen between the appellant and its workmen in respect of the following matter:

> "Absorption of Bharat Bank employees in the Punjab National Bank Ltd., and their service conditions".

On 17th April, 1954, in the course of certain preliminary proceedings before respondent No. 1, an application was made on behalf of the All-India Punjab National Bank Employees' Federation, in which it was stated that a number of other Unions were involved in the dispute in question, because the appellant had branches all over India and there were several Unions of its employees at those branches. It was further stated in the application that some of those Unions had submitted their statements when the dispute in question was referred to the Industrial Tribunal, Bombay, with Shri Panchapagesa Shastri as its sole member and Chairman; that Tribunal did not, however, function as Shri Panchapagesa Shastri was appointed a member of the Labour Appellate Tribunal of India. Two substantial prayers were made in the application of 17th April, 1954: one was that due publicity of the adjudication, proceedings should be given by issuing notices to all those Unions to participate in the proceedings, and the second prayer was that an order should be made directing the appellant to pay travelling and halting allowances to the representatives of the various Unions so as to enable the latter to send their representatives to Delhi, the place where the adjudication proceedings were pending. A list of fourteen Unions and organisations was given along with the application, with the number of representatives which each union or organisation wished to send.

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* C.A. No. 134 of 1955. 20th December, 1956.

In the present appeal we are concerned only with the second prayer made in the aforesaid application, and the order which respondent No. 1 made with regard to that prayer, being the order impugned before us, was in these terms:

> "The management objects to the grant of any T.A. or halting allowance to the representatives of the Unions. It is, no doubt, correct that there is no provision of law on this point in favour of the representatives, but the general practice of various Tribunals has all along been to allow reasonable T.A. and halting allowance to the representatives of the Unions, specially in Banks' cases. It is therefore, ordered that the representatives of the Unions, who put in appearance in the Tribunal from stations outside Delhi, shall be paid 2½ second class railway fares to and from Delhi, plus Rs. 10 per day as halting allowance, by the management of the bank.
>
> ....
>
> The Bank is also requested to direct its respective branches to pay travelling and halting allowances in advance to the employees who intend to come to Court as representatives ".

It may be stated here that out of the fourteen Unions and organisations which wanted to send their representatives to take part in the adjudication proceedings, two have their offices in Delhi. Respondent No. 1 directed the payment of travelling and halting allowances to the representatives of the remaining twelve Unions and organisations, and fixed the number of representatives to be sent by each Union or organisation.

The plea of the appellant was that the order passed by respondent No. 1 was wholly without jurisdiction and was also unjust, involving as it did an expenditure of not less than Rs. 2,500 for each day of hearing in the course of the proceedings before respondent No. 1. On that plea the appellant moved the Punjab High Court for the issue of a writ of *certiorari* or such other writ as might be appropriate, for the purpose of quashing the order of respondent No. 1. The Punjab High Court, however, dismissed the petition of the appellant *in limine* on 14th May, 1954. The appellant then asked for and obtained special leave from this Court on 18th October, 1954.

The question for decision is a very short one. The respondents appearing before us have sought to support the impugned order on the strength of the provisions of sub-section (7) of section 11 of the Industrial Disputes Act, 1947 (XIV of 1947), hereinafter referred to as the Act. That sub-section which was added by Act XLVIII of 1950 and which we shall presently read, lays down, *inter alia*, that the costs of, and incidental to, any proceeding before a Tribunal shall be in the discretion of that Tribunal, and the Tribunal shall have full power to determine by and to whom and to what extent and subject to what conditions, if any, such costs are to be paid and to give all necessary directions for the purposes aforesaid. The question is whether respondent No. 1 had power, in the exercise of his discretion under the provisions of sub-section (7) of section 11, to direct the payment of costs in advance by one of the parties to the dispute to the other parties in a pending proceeding, irrespective of the final result of that proceeding.

In our opinion, the question admits of only one answer. Sub-section (3) of section 11 enumerates certain powers vested in a Civil Court under the Code of Civil Procedure, and says that every Board, Court and Tribunal under the Act shall have those powers; the last enumerated power is in general terms, being "in respect of such other matters as may be prescribed". No rules made under the Act bearing on the question of costs have been brought to our notice: therefore, all that can be said, with regard to the effect of sub-section (3) of section 11, is that except the enumerted powers, other powers vested in a Civil Court under the Code of Civil Procedure have not been given to the Board, Court or Tribunal under the Act. The Act, however, contains a separate provision in the matter of costs and that is sub-section (7) of section 11. That sub-section reads (we are quoting it as it stood at the relevant time prior to the amendment of 1956):

> " Subject to the rules made under this Act, the costs of, and incidental to, any proceeding before a Tribunal shall be in the discretion of that Tribunal, and theTribunal shall have full power to determine by and to whom and to what extent and subject to what conditions, if any, such costs are to paid, and to give all necessary directions for the purposes aforesaid, and such costs may, on application made to it by the person entitled, be recovered as arrears of land revenue or as a public demand by the appropriate Government ".

A comparison of the sub-section with section 35 of the Code of Civil Procedure shows that the sub-section is in terms similar to those of section 35 of the Code of Civil Procedure except for the concluding portion of the sub-section which relates to the recovery of costs as arrears of land revenue. There is also another difference in that sub-sections (2) and (3) of section 35, Civil Procedure Code, do not find place in the Act. On a plain reading of the sub-section, it is manifest that (1) the expression "costs of any proceeding" means costs of the entire proceeding as determined on its conclusion and not costs in a pending proceeding, nor costs to be incurred in future by a party; and (2) the expression "costs incidental to any proceeding" similarly means costs of interlocutory applications, etc.—such costs as have been determined thereon, at the conclusion of the hearing. Neither of the two expressions has any reference to costs payable in advance or to be incurred in future by a party; far less do they refer to halting and travelling allowances to be incurred by a party while attending the Court on his own behalf. Respondent No. 1 correctly appreciated the legal position, and said that there was no provision of law in support of the claim made by the respondents. He relied, however, on the general practice of Industrial Courts, particularly in Bank's cases. We doubt if there was any such general or consistent practice; nor do we think that such practice, if any, is legally justified. But we shall advert to this matter when considering such of the decisions of Industrial Tribunals as have been placed before us.

Learned counsel for the respondents has not relied on practice, but on the terms of the sub-section. He has submitted that the concluding portion of the sub-section which states that "such costs may, on application made to it by the person entitled, be recovered as arrears of land revenue or as a public demand by the appropriate Government" shows that costs may be granted in advance in a pending proceeding. His argument has proceeded on these lines: firstly, he has submitted that an Industrial Tribunal becomes *functus officio* with the submission of the award; secondly, the concluding portion of the sub-section shows that an application for recovery of costs can be made to "it" (that is, the Tribunal); therefore, the application must be made before the Tribunal becomes *functus officio*; that is, at a stage when the proceeding is still pending. In our opinion, this argument is wholly fallacious and proceeds on a misreading of the sub-section. The expression "it" in the concluding portion of the sub-section refers to the appropriate Government and not to the Tribunal; thus the very basis of the argument disappears and it is unnecessary to consider if the tribunal becomes *functus officio* with the submission of its award—a proposition regarding which we express no opinion.

It is not disputed that sub-section (7) of section 11 of the Act gives a discretion to the Tribunal, and it has full power to determine by and to whom and to what extent and subject to what conditions, if any, the costs are to be paid. It is clear, however, that the discretion is a judicial discretion and must be exercised according to the rules of reason and justice—not by chance or caprice or private opinion or some fanciful idea of benevolence or sympathy. It is a negation of justice and reason to direct the appellant to pay in advance the costs of the respondents irrespective of the final result of the proceeding. The general rule is that costs follow the event unless the Court, for good reasons, otherwise orders. Respondent No. 1 gave no reasons for his order except that of practice—a practice, assuming there be any such practice, which is neither legal nor just. It may be conceded that the jurisdiction of an Industrial Tribunal is not invoked for the enforcement of mere contractual rights and liabilities of the parties to the dispute referred to the Tribunal for adjudication; its jurisdiction in the matter of adjudication of an industrial dispute is wider and more flexible. All the same, it is not an arbitrary jurisdiction; it may be readily conceded that an employee is as much entitled to a fair deal as an employer and he must be protected from victimisation and unfair labour practice, but 'social justice' does not mean that reason and fairness must always yield to the convenience of a party—convenience of the employee at the cost of the employer as in this case—in an adjudication proceeding. Such one-sided or partial view is really next of kin to caprice or humour. Lord Halsbury, L.C., put the matter in characteristically forceful language when he said:

> "........' discretion ' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion : *Rooke's Case*[1] ; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular ". (*Susannah Sharp* v. *Wakefield*[2]).

There are special cases where in a pending proceeding some costs may have to be borne by a party to a litigation; for example, sub-rule (4) of rule 4 of Order 32, Code of Civil Procedure, says that where there is no other person fit and willing to act as guardian of a minor for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit. Section 35 of the Code is not only subject to such conditions and limitations as may be prescribed, but is also subject to the provisions of any law for the time being in force. Under the Matrimonial Causes Rules, 1950, the practice in English Courts is that after the Registrar's certificate for trial has been granted, or, with leave, at an earlier stage of the cause, a wife who is a petitioner and has asked for costs or who has filed an answer, may apply for security for her costs of the cause up to the hearing, and of and incidental to the hearing (*see* Halsbury's Laws of England, 3rd Edition, Volume 12, paragraph 765 at page 358). When such security is ordered, unless the husband elects to pay the amount into the Registry and give notice to the wife's solicitor, a bond is required from him. Such cases stand on a special footing and are governed by special statutory provisions. They have no application in the present case and afford no justification for the order impugned before us..

We now turn to the question of practice in the Labour Courts. The earliest decision which has been brought to our notice is *Kirloskar Brothers, Ltd.* v. *Their Workmen.*[3] That was a case in which one of the demands for adjudication was the demand for travelling and other expenses of the workers' repre-

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1. 5 Rep. 100, a.
2. L.R. (1891) A.C. 173, 179.
3. (1951) 2 L.L.J. 557.

sentatives, when such representatives were required to go out at the instance of any duly constituted authority or Court in respect of any industrial matter. It was observed :

> " The demand according to the company amounted to financing the administration of the Union and was therefore objectionable even on psychological grounds ".

The Tribunal directed that the travelling and other expenses to be incurred in connection with the Union work must be paid out of the Union funds and the employer could not be required to contribute the sum.

In the well-known case, *Certain Banking Companies* v. *Their Workmen*[1] the question of facilities for effective representation of their cases on behalf of the employees was raised and considered at some length. The decision given was that the Tribunal had power and jurisdiction, under sub-section (7) of section 11 of the Act, to direct the Banks to meet the reasonable expenses of the workmen in a pending proceeding in order to ensure a fair and effective hearing. The grounds on which the decision was based were these : (1) the Banks were well organised and their managements were in possession of resources ; (2) the adjudication by a Labour Court or Industrial Tribunal was a compulsory adjudication in the interests of the public, and as disputes relating to Banking companies, with establishments in more than one State, were referred to the Tribunal by the Central Government, the circumstance that various workmen residing in various States were compelled to submit to an adjudication by a Central Tribunal was sufficient to justify an order for the payment of their travelling and halting allowances ; (3) there was nothing in the Act to preclude the exercise of such power on the part of the Industrial Tribunal as was required to carry on the fundamental object of ensuring a proper hearing for the two parties to the dispute, and the weaker party, namely, the comparatively unorganised, numerous and scattered workmen employed in different branches, needed assistance to present their case ; (4) prior to the addition of sub-section (7) of section 11 in 1950, various Industrial Tribunals used to pass similar orders and it was in recognition of the necessity of such orders that the statutory provision in the sub-section was made ; and (5) the principles of natural justice required that a real opportunity should be given to the workmen to present their case by asking the employer to pay for their expenses. In our opinion, not one of the aforesaid grounds is really sustainable, either in law or on the principle of justice, equity and good conscience. The circumstance that the Banks are well organised and their managements are in possession of resources cannot be a ground for making them pay for the expenses of the other party; if that is the principle to be applied, then in every case the richer party must be made to pay the expenses of the weaker party, irrespective of the ultimate result of the dispute ; even in a dispute raised by the workmen which may be ultimately found to be devoid of all merit, the employer must be made to finance the workmen. Such a principle will merely encourage frivolous and unsubstantial disputes and will run counter to the object and purposes of the Act, namely, the promotion of industrial peace in the interests of the general public. The second circumstance that the adjudication is a compulsory adjudication applies equally to both parties. If it is a compulsory adjudication for the employees, it is equally so for the employer and we can see no reason why that circumstance should involve the imposition of a penalty on one of the parties to the dispute and not on the other. We have already pointed out that on a proper construction of the sub-section, there is no power in the Tribunal to direct the payment of the costs of a party in advance by the other party, irrespective of the final result of the proceeding, and the view expressed by the Bank Disputes Tribunal as to the construction of the relevant sub-section is manifestly erroneous ; nor are we satisfied that prior to the addition of the sub-section, there was any consistent or uniform practice in the matter, so as to lead to the inference that the provisions of the sub-section gave statutory recognition to the practice. It is difficult to understand how the principles of natural justice can be invoked in aid of an order which penalises one party to a dispute by making it pay for the costs of the other party in advance, irrespective of the result of the proceeding. We can only say that such an order is neither natural nor has any element of justice in it.

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[1] (1952) 2 L.L.J. 54.

In a later decision, *Associated Cement Companies, Ltd., Dwarka Cement Works, Dwarka* v. *Workmen Employed under it*,[1] it was observed :

> "if, therefore the Union's representatives thought it proper to attend on the various date before the Tribunal, it is the Union who should bear the costs".

In a still later decision, *Jeevan Textile Mills* v. *Their Workmen*[2], the question was again considered at some length. With regard to sub-section (7) of section 11 it was observed :

> "Although section 11 (7) is worded in a very wide way and the power to order the payment of costs granted under it to industrial tribunals is made comprehensive and is not even fettered: by a provision like section 35 (2) of the Code of Civil Procedure, requiring the tribunal to state its reason if costs are not ordered to follow the event, orders for costs can only be made, even by industrial tribunals, on well-recognised principles and not on any abstract ideas as to what irrespective of such principles, should be considered as desirable in any particular case *vide United Commercial Bank Case*."[3]

We are in agreement with the view expressed above.

It would appear from what we have stated above that there was no uniform or consistent practice, in the matter, and we are further of the view that if there was any such practice, it was neither warranted by law nor by the principles of reason and justice. In Ex parte *Snow*, In re *Sherwell*[4] an application was made to review a taxation of costs and the appellant, who was a Barrister-at-Law and resided at Liverpool, claimed his travelling expenses from Liverpool to London and back, on the ground that by arguing his own appeal he had saved the expense of engaging counsel to which he would have been entitled. The claim was dismissed as "preposterous and unheard of."

As we began, so we end : there is only one answer to the question and that answer is that respondent No. 1 had no power, in the exercise of his discretion under sub-section (7) of section 11 of the Act, to direct the appellant in this case to pay the travelling and halting allowances of the representatives of the Unions in a pending proceeding and irrespective of its final result. For the reasons given, this appeal is allowed with costs, and the costs must be paid by the contesting respondents. The order of respondent No. 1 so far as it relates to the payment in a pending proceeding of travelling and halting allowances to the representatives of the various Unions, must be, and is hereby, set aside.

Appeal allowed.

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[1] (1953) I.C.R. Bom. 292, 307.

[2] (1956) 1 L.L.J. 423.

[3] (1952) 2 L.L.J. 1.

[4] (1879) W.N. 22.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—MR. S. R. DAS, *Chief Justice*, N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, B. P. SINHA AND S. K. DAS, JJ.

A. S. Krishna and others .. *Appellants**

v.

State of Madras .. *Respondent.*

Madras Prohibition Act (*X of* 1937), *sections* 4 (2) *and* 28 *to* 32—*Constitutional validity*—*Government of India Act* (1935), *Schedule VII, List II, Entry* 31 *and section* 107 (1)—*Constitution of India* (1950), *Article* 13 (1).

When a law is impugned on the ground that it is *ultra vires* the powers of the Legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *intra vires*, and what are not.

The Madras Prohibition Act is both in form and in substance, a law relating to intoxicating liquors. The presumptions in section 4 (2) are not presumptions which are to be raised in the trial of all criminal cases, as are those enacted in the Evidence Act. They are to be raised only in the trial of offences under section 4 (1) of the Act. They are therefore purely ancillary to the exercise of the legislative power in respect of Entry 31 in List II of Government of India Act, 1935. So also the provisions relating to search, seizure and arrests in sections 28 to 32 are only with reference to offences committed or suspected, to have been committed under the Act. They have no operation generally or to offences which fall outside the Act. Neither the presumptions in section 4 (2) nor the provisions contained in sections 28 to 32 have any operation apart from offences created by the Act, and must be held to be wholly ancillary to the legislation under Entry 31 in List II. The Madras Prohibition Act is thus in its entirety a law within the exclusive competence of the Provincial Legislature, and the question of repugnancy (with Evidence Act and Criminal Procedure Code) under section 107 (1) does not arise.

Even on the application of the due process clause, the presumption laid down in section 4 (2) of the Act cannot be struck down as unconstitutional.

The matters mentioned in section 4 (2) should be read distributively in relation to the offences mentioned in section 4 (1). The contention that there is no reasonable relation between the presumption and the offence is based on a misreading of the section.

(1954) 2 M.L.J. 475, affirmed.

Appeals by special leave from the judgment and order, dated the 7th May, 1954, of the Madras High Court in Criminal Revision Cases Nos. 57 to 60 of 1954 and Cases Referred Nos. 2 to 5 of 1954).†

N. C. Chatterji, Senior Advocate (*S. Venkatakrishnan* and *S. Subramanian*, Advocates, with him) for Appellants.

V. K. T. Chari, Advocate-General, Madras. (*Ganapathy Iyer* and *T. M. Sen*, Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The point for decision in these appeals is whether sections 4 (2), 28, 29, 30, 31 and 32 of the Madras Prohibition Act No. X of 1937, hereinafter referred to as the Act, are unconstitutional and void.

It will be convenient first to set out the impugned statutory provisions. Section 4, omitting what is not material, runs as follows :

" 4. (1) Whoever

(*a*) imports, exports, transports or possesses liquor or any intoxicating drug ; or

. . . . . .

(*g*) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the tapping toddy or the manufacture of liquor or any intoxicating drug ; or

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* C.A. Nos. 20 to 23 of 1955. 28th November, 1956.

† (1954) 2 M.L.J. 475.

(*j*) consumes or buys liquor or any intoxicating drug ; or

(*k*) allows any of the acts aforesaid upon premises in his immediate possession,

shall be punished—

. . . . .

Provided that nothing contained in this sub-section shall apply to any act done under, and in accordance with, the provisions of this Act or the terms of any rule, notification, order, licence or permit issued thereunder.

(2) It shall be presumed until the contrary is shown—

(*a*) that a person accused of any offence under clauses (*a*) to (*j*) of sub-section (1) has committed such offence in respect of any liquor or intoxicating drug or any still, utensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug, for the possession of which he is unable to account satisfactorily ; and

(*b*) that a person accused of any offence under clause (*k*) of sub-section (1) has committed such offence if an offence is proved to have been committed in premises in his immediate possession in respect to any liquor or intoxicating drug or any still, untensil, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug, or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug ".

Section 28 provides that if any Collector, Prohibition Officer or Magistrate has reason to believe that an offence under section 4 (1) has been committed, he may issue a warrant for search. Section 29 confers on certain officers power to search and seize articles even without a warrant, under certain circumstances. Section 30 provides for certain classes of officers entering any place by day or night for inspection of stills, implements, liquor and the like. Section 31 authorises the officers empowered to make entry under sections 28, 29 or 30 to break open any door or window and remove obstacles, if otherwise they could not make entry. Section 32 confers authority on a Prohibition Officer or any officer of the Police or Land Revenue Departments to arrest without warrant any person found committing any offence under section 4 (1).

Now, the facts are that on November 18, 1953, the Prohibition Officer, Madras City and the Deputy Commissioner of Police made a search of premises No. 28, Thanikachala Chetty Street, Thyagarayanagar, Madras and seized several bottles of foreign liquor and glasses containing whisky and soda. The appellant, Lakshmanan Chettiar was residing at the premises and the other three appellants, A. S. Krishna, R. Venkataraman and V. S. Krishnaswami, were found drinking from the glass tumblers. All the four were immediately put under arrest and in due course, charge-sheets were laid against them for offence under the Act. The three appellants other than Lakshmanan Chettiar were charged under section 4 (1) (*a*) and 4 (1) (*j*) for possession and consumption of liquor, and Lakshmanan Chettiar was charged under section 4 (i) (*k*) for allowing the above acts in premises in his immediate possession, and under section 12 for abetment of the offences. He was also charged under section 4 (i) (*a*) on the allegation that though he was a permit-holder, he was in possession of more units than were allowed under the permit, and that by reason of the provisio to that section, he had committed an offence under section 4 (i) (*a*). Immediately after service of summons, the appellants filed an application under section 432 of the Criminal Procedure Code, wherein they contended that sections 4 (2) and 28 to 32 of the Act were repugnant to the provisions of the Constitution, and were therefore void, and prayed that the above question might be referred for the decision of the High Court. The Third Presidency Magistrate before whom the proceedings were pending, allowed the application, and referred to the High Court as many as seven questions on the constitutionality of various sections of the Act. This reference was heard by Rajamannar, C. J., and Umamaheswaram, J., who held[1], disagreeing with the appellants, that sections 4 (2) and 28 to 32 were valid, and answered the reference against them. Against this judgment, the appellants have preferred the present appeals under Article 136 of the Constitution.

Two contentions have been urged in support of the appeals : (1) section 4 (2) and sections 28 to 32 of the Act are void under section 107 of the Government of

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[1] (1954) 2 M.L.J. 475.

India Act, 1935, which was the Constitution Act in force when the Act in question was passed, because they are repugnant to the provisions of existing Indian laws with respect to the same matter, to wit, Indian Evidence Act (I of 1872) and Criminal Procedure Code Act No. V of 1898, and (2) the impugned sections are repugnant to Article 14 of the Constitution, and have therefore become void under Article 13 (i).

(1) Taking the first contention, the point for decision is whether the impugned provisions are hit by section 107 of the Government of India Act, 1935. Sub-section (1) of section 107, which is the relevant provision, runs as follows :

> " If any provisions of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void ".

For this section to apply, two conditions must be fulfilled: (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the provincial law will, to the extent of the repugnancy, become void. The first question, therefore, that has to be decided is, is the subject-matter of the impugned legislation one that falls within the Provincial List, in which case section 107 would be inapplicable, or is it one which falls within the Concurrent List, in which case the further question, whether it is repugnant to the Central legislation will have to be decided ?

The Entries in the Lists which are material for the present discussion are the following :

List II—Provincial Legislative List.

2. Jurisdiction and powers of all Courts except the Fenderal Court, with respect to any of the matters in this list ; procedure in Rent and Revenue Courts.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List 1 and as respects poisons and dangerous drugs, to the provisions of List III.

37. Offences against laws with respect of any of the matters in this List.

List III—Concurrent Legislative List.

2. Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

5. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.

Now, it is not contested that the Madras Prohibition Act, as a whole, is a law in respect of intoxicating liquors, falling within Entry 31 of the Provincial List. The declared object of the enactment as stated in the preamble to it is " to bring about the prohibition. . . of the production, manufacture, possession, export, import, transport, purchase, sale and consumption of intoxicating liquors. . . " And this is carried out in section 4 (1), which enacts prohibition in respect of the above matters, and imposes penalties for breach of the same. The other provisions of the Act may broadly be divided into those which are intended to effectuate section 4 (1) and those which regulate the grant of licenses and permits. The legislation is thus on a topic which is reserved to the Provinces and would therefore fall outside section 107 (1) of the Constitution Act.

The argument of Mr. N. C. Chatterjee for the appellant is that though the Act is within the competence of the Provincial Legislature in so far as it prohibits possession, sale, consumption, etc., of liquor under section 4 (i) the matters dealt with under section 4 (2) and sections 28 to 32 fall not within Entry 31 of List II but within Entries 5 and 2 respectively of List III, and to that extent, the legislation is on matters enumerated in the Concurrent List. He contends that section 4 (2) enacting as it does, a presumption to be drawn by the Court on certain facts being established, deals with what is purely a matter of evidence, and it is therefore not a law on intoxicating liquors but evidence. Likewise, he argues, the provisions in sections 28 to 32 deal with matters pertaining to Criminal Procedure, such as warrants, seizure and arrest, and have no connection with intoxicating liquors. It is accordingly contended that sections 4 (2) and 28 to 32 are legislation under Entries 5 and 2 of List III, and that their validity must be tested under section 107 (1).

The appellants are right in their contention that section 4 (2) of the Act enacts a rule of evidence but does it follow from this that it is a law on evidence, such as is contemplated by Entry 5 in the Concurrent List? So also sections 28 to 32 undoubtedly deal with matters of procedure in relation to crimes, but are they for that reason to be regarded as legislation on Criminal Procedure Code within Entry 2 of List III? The basic assumption on which the argument of the appellants rests is that the heads of legislation set out in the several Lists are so precisely drawn as to be mutually exclusive. But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial Legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was *intra vires*, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the Legislature, it should be held to be *intra vires*, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within its competence, the Legislature, is in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the *vires* of the law even as regards the area of encroachment. Vide *Citizens Insurance Company of Canada* v. *William Parsons*[1], *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion of Canada*[2], *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion*[3], *Union Colliery Company of British Columbia* v. *Bryden*[4], *Attorney-General for Canada* v. *Attorney-General for Ontario*[5], *Attorney-General for Alberta* v. *Attorney-General for Canada*[6], and *Board of Trustees of Letherbridge Northern Irrigation District* v. *Independent Order of Foresters*[7].

The principles laid down in the above decisions have been applied in deciding questions as to the *vires* of statutes passed by the Indian Legislatures under the Government of India Act, 1935. In *Subrahmanyan Chettiar* v. *Muttuswami Goundan*[8], the question was as to whether the Madras Agriculturists' Relief Act (IV of 1938) which was within the exclusive competence of the Provincial Legislature under Entries 20 and 21, in List II was *ultra vires*, in so far as it related to promissory notes executed by agriculturists by reason of the fact that under Entry 28, List 1, " cheques, bills of exchange, promissory notes and other like instruments " were matters falling within the exclusive jurisdiction of the Centre. In holding that the legislation was *intra vires*, Sir Maurice Gwyer, C. J., stated the reason in these terms :

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[1] L.R. (1881) 7 A.C. 96.

[2] L.R. (1894) A.C. 189.

[3] L.R. (1896) A.C. 348.

[4] L.R. (1899) A.C. 580.

[5] L.R. (1937) A.C. 355.

[6] L.R. (1939) A.C. 117.

[7] L.R. (1940) A.C. 513.

[8] (1940) F.C.R. 188 : (1939-40) F.L.J. 157 : (1941) 1 M.L.J. (Sup.) 1 (F.C.).

> " It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden shpere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its ' pith and substance ' or its ' true nature and character ', for the purpose of determining whether it is legislation in respect of matters in this list or in that................"

This point arose directly for decision before the Privy Council in *Prafulla Kumar Mukherjee* v. *The Bank of Commerce, Ltd*[1]. There, the question was whether the Bengal Money lenders Act, 1940, which limited the amount recoverable by a money-lender for principal and interest on his loans, was valid in so far as it related to promissory notes. Money-lending is within the exclusive competence of the Provincial Legislature under Item 27 of List II, but promissory note is a topic reserved for the Centre, *vide* List I, Item 28. It was held by the Privy Council that the pith and substance of the impugned legislation being money-lending, it was valid notwithstanding that it incidentally encroached on a field of legislation reserved for the Centre under Entry 28. After quoting with approval the observations of Sir Mauric Gwyer, C.J., in *Subramanyan Chettiar* v. *Muttuswami Goundan*[2], above quoted, Lord Porter observed :

> " Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion legislation.
>
> " No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existing of Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with."

Then, dealing with the question of extent of the invasion by the Provincial legislation into the federal fields, Lord Porter observed :

> "No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

Then, there is the decision of the Federal Court in *Lakhi Narayan Das* v. *The Province of Bihar*[3]. There, the question related to the validity of Ordinance No. IV of 1949 promulgated by the Governor of Bihar. It was attacked on the ground that as a legislation in terms of the Ordinance would have been void, under section 107 (1) of the Government of India Act, the Ordinance itself was void. The object of the Ordinance was the maintenance of public order, and under Entry 1 of List II, that is a topic within the exclusive competence of the Province. Then the Ordinance provided for preventive detention, imposition of collective fines, control of processions and public meetings, and there were special provisions for arrest and trial for offences under the Act. The contention was that though the sections of the Ordinance relating to maintenance of public order might be covered by Entry 1 in List II, the sections constituting the offences and providing for search and trial fell within Items 1 and 2 of the Concurrent List, and they were void as being repugnant to the provisions of the Criminal Procedure Code. In rejecting this contention, Mukherjea, J., observed :

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[1] (1946-47) L.R. 74 I.A. 23 : (1947) F.C.R. 28 : (1947) 2 M.L.J. 6 (P.C.).

[2] (1940) F.C.R. 188 ; (1939-40) F.L.J. 157 ; (1941) 1 M.L.J. (Sup.) 1.

[3] (1950) 1 M.L.J. 760 : (1950) S.C.J. 32 ; (1949) F.C.R. 693.

> "Thus all the provisions of the Ordinance relate to or are concerned primarily with the maintenance of public order in the Province of Bihar and provide for preventive detention and similar other measures in connection with the same. It is true that violation of the provisions of the Ordinance or of orders passed under it have been made criminal offences but offences against laws with respect to matters specified in List II would come within Item (37) of List II itself, and have been expressly excluded from Item (1) of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the conferring of jurisdiction on certain Courts for that purpose would be covered completely by Item (2) of List II and it is not necessary for the Provincial Legislature to invoke the powers under Item (2) of the Concurrent List".

He accordingly held that the entire legislation fell within Entries 1 and 2 of List II, and that no question of repugnancy under section 107 (1) arose. This reasoning furnishes a complete answer to the contention of the appellants.

The position, then, might thus be summed up : When a law is impugned on the ground that it is *ultra vires* the powers of the Legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *intra vires*, and what are not. Now, the Madras Prohibition Act is, as already stated, both in form and in substance, a law relating to intoxicating liquors. The presumptions in section 4 (2) are not presumptions which are to be raised in the trial of all criminal cases, as are those enacted in the Evidence Act. They are to be raised only in the trial of offences under section 4 (1) of the Act. They are therefore purely ancillary to the exercise of the legislative power in respect of Entry 31 in List II. So also, the provisions relating to search, seizure and arrest in sections 28 to 32 are only with reference to offences committed or suspected to have been committed under the Act. They have no operation generally or to offences which fall outside the Act. Neither the presumptions in section 4 (2) nor the provisions contained in sections 28 to 32 have any operation apart from offences created by the Act, and must, in our opinion, be held to be wholly ancillary to the legislation under Entry 31 in List II. The Madras Prohibition Act is thus in its entirety a law within the exclusive competence of the Provincial Legislature, and the question of repugnancy under section 107 (1) does not arise.

(2) It is next contended that the presumptions raised in section 4 (2) of the Act are repugnant to Article 14 of the Constitution, and that the section must accordingly be declared to have become void under Article 13 (1). We are unable to see how section 4 (2) offends the requirement as to equality before law or the equal protection of laws. The presumptions enacted therein have to be raised against all persons against whom the facts mentioned therein are established. The argument of Mr. N. C. Chatterjee is that the fact set out in section 4 (2) on which the presumption of guilt is raised have no reasonable relation to the offences themselves, that for example, possession of liquor can be no evidence of possession of materials or apparatus for manufacture of liquor under section 4 (1) (*g*), nor possession of materials or apparatus, for manufacture of liquor, evidence of possession or consumption of liquor under section 4 (1) (*a*) and (*j*), and that therefore the impugned provision must be struck down as denying equal protection. He relied in support of this contention on the following observations of Holmes J., in *William N. Mc Farlane* v. *American Sugar Refining Company*[1]:

> "As to the presumptions, of course, the Legislatures may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one

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[1] 241 U.S. 79 at 86-87: 60 Law. Ed. 899, 904.

> fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *Mobile J. & K. C. R. Co* v. *Turnipseed*"[1].

The law on this subject is thus stated by Rottschaefer on Constitutional Law, 1939 Edition, at page 835 :

> "The power of a Legislature to prescribe rules of evidence is universally recognised, but it is equally well established that due process limits it in this matter. It may establish rebuttable presumptions only if there is a rational connection between what is proved and what is permitted to be inferred therefrom ".

The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution. But a reference to American authorities clearly shows that the presumptions of the kind enacted in section 4 (2) have been upheld as reasonable and not hit by the due process or equal protection clause. In *Albert J., Adams* v. *People of the State of New York*[2], a law of New York had made it an offence to be knowingly in possession of gambling instruments, and enacted further that possession of such instruments was presumptive evidence of knowledge. It is thus in terms similar to section 4(1)(*a*) of the Act, which makes it an offence to be in possession of liquor, and to section 4 (2) which raises a rebuttable presumption of guilt under section 4 (1) (*a*). In rejecting the contention that the presumption was a violation of the due process clause, the Court observed:

> " We fail to perceive any force in this argument. The policy slips are property of an unusual character, and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only *prima facie* evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. Furthermore, it is within the established power of the state to prescribe the evidence which is to be received in the Courts of its own Government ".

In *Robert Hawes* v. *State of Georgia*[3], the question arose with reference to a statute of the State of Georgia, which had made it an offence to knowingly permit persons to locate in premises apparatus for distilling and manufacturing prohibitied liquors. It also enacted a presumption that when such apparatus was found in a place, the person in occupation thereof shall be presumed to have knowingly permitted the location of the apparatus. The question was whether this presumption was repugnant to the due process clause. In holding that it was not, the Court observed :

> " Distilling spirits is not an ordinary incident of a farm, and, in a prohibition state, has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm, or one who occupies it, will know what there is upon it. It is not arbitrary for the state to act upon the presumption and erect it into evidence of knowledge not peremptory, of course, but subject to explanation, and affording the means of explanation ".

It is therefore clear that even on the application of the due process clause, the presumptions laid down in section 4 (2) cannot be struck down as unconstitutional. We should add that the construction which the appellants seek to put on section 4 (2) that a person in possession of liquor could, under that section, be presumed to have committed an offence under section 4 (1) (*g*) or that a person who is in possession of materials, implement or apparatus could be presumed to have committed offences under section 4 (1) *a*) and (*j*) is not correct. In our opinion, the matters mentioned in section 4 (2) should be read distributively in relation to the offences mentioned in section 4 (1). Possession of liquor, for example, is an offence under section 4 (1) (*a*). The presumption in section 4 (2) is that if it is found in the possession of a person, he should be presumed to have committed the offence under section 4 (1) (*a*), unless he could give satisfactory explanation therefor, as for example, that it must have been foisted in the place without his knowledge. Likewise, it would be an offence under section 4 (1) (*g*) to be in possession of materials, still, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor. Under section 4 (2) (*a*), if a person is found to be in possession of materials or other things mentioned in the sub-section, there is a presumption that he has committed an offence under section 4 (1) (*g*), but it is open to him to account satisfactorily therefor. The contention, therefore, that there is no reasonable relation between the presumption and the offence is, in our opinion, based on a misreading of the section.

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[1] 219 U.S. 35, 43 ; 55 L.Ed. 78, 80.

[2] 192 U.S. 585 : 48 L. Ed. 575.

[3] 258 U.S. 1; 6 L. Ed. 431.

Both the contentions urged on behalf of the appellants having failed, these appeals are dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction].

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, S. K. DAS, JJ.

Srimati Kamala Devi and another .. *Appellants**

v.

Bachulal Gupta and others .. *Respondents.*

Hindu Law (Mitakshara)—Widow—Alienation—Gift of immoveable property to daughter two years after marriage—Validity.

Transfer of Property Act (IV of 1882), section 123—Scope of—If affects the power of a Hindu widow to make a gift valid under Hindu law.

Hindu Succession Act (XXX of 1956), section 14—Widow granted life estate in her husband's property under a decree—If becomes absoute under the section.

A Hindu widow has the power to make an alienation of a reasonable portion of her husband's estate in favour of her daughter as marriage dowry sometime after the marriage to fulfil a promise made before a religious act which confers spiritual benefit on her husband. (Case-law reviewed).

The right of a Hindu widow to make a gift is governed by Hindu Law and it is open to her to make an effective gift in favour of her daughter subsequent to the marriage, if the conditions laid down by Hindu law are fulfilled. Section 123 of the Transfer of Property Act does not deal with nor does it affect the power of a Hindu widow to effect such a gift to her daughter.

Quaere : Whether a Hindu widow in possession of her husband's estate acquired under a decree granting only a life estate becomes an abolute owner thereof by virtue of section 14 of the Hindu Succession Act, 1956?

On appeal by special leave from the judgment and decree, dated 6th April, 1950, of the Calcutta High Court in Appeal from Original Decree No. 166 of 1944 arising out of the Decree, dated the 30th June, 1943, of the Court of the Subordinate Judge, Asansol, in Title Suit No. 2 of 1942.

Ramanugrah Prasad and *Mohan Beharilal*, Advocates for Appellants.

H. J. Umrigar and *S. P. Varma*, Advocates, for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

S.K. Das, J.—This is an appeal by special leave from the judgment and decree of the High Court of Calcutta, dated April 6, 1950, by which the said High Court affirmed the judgment and decree of the Subordinate Judge of Asansol, dated June 30, 1943, in Title Suit No. 2 of 1942. The suit was instituted by the four sons of one Sri Ram Kishori Lal Sao, a resident of Asansol in Bengal, who died in September 1927. One of the plaintiffs, Kalicharan, died during the pendency of the suit and his heirs were brought on the record as plaintiffs in his stead. The defendants were Mst. Sumitra Devi, widow of the late Ram Kishori Lal, (defendant No. 1) and Smt. Kamala Devi, daughter of the late Ram Kishore Lal (defendant No. 2). The said defendants, 1 and 2 are the appellants before us.

The suit was instituted for a declaration that a deed of gift, dated March 10, 1940, executed by Mst. Sumitra Devi in favour of her daughter Smt. Kamala Devi, was void and inoperative beyond the lifetime of Mst. Sumitra Devi and was not binding on the reversion. The following genealogical table shows the relation *inter se* between the parties:

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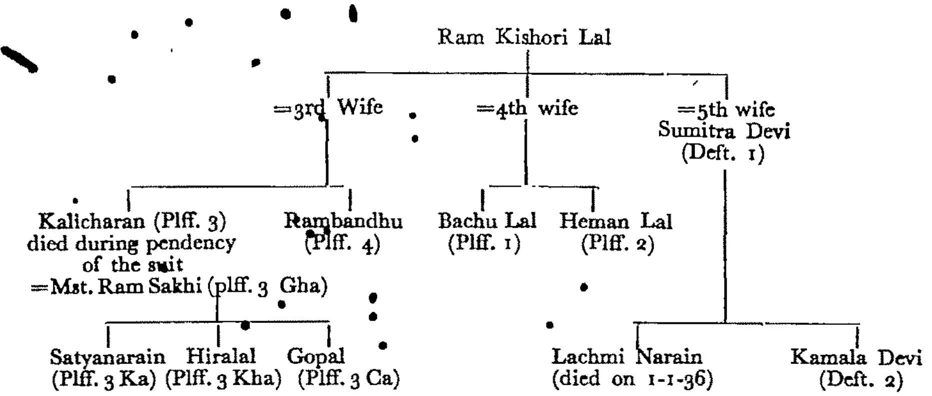
* C.A. No. 158 of 1953. 29th January, 1957.



On his death, Ram Kishore Lal had left extensive properties worth several lakhs, including some houses in Asansol, two businesses at Howrah and Asansol, and large amounts of money deposited in Banks or invested in loans, etc. Shortly after his death, Sumitra Devi, for herself and as guardian of her two children, Lachmi Narain and Kamala, brought a suit against her stepsons for partition of the properties left by her husband. This suit was registered as Title Suit No. 664 of 1927 in the Court of the Subordinate Judge of Asansol. A preliminary decree was passed in the suit on July 22, 1933, and a final decree on June 29, 1936. This decree provided for payment of Rs. 10,000 as expenses for the marriage of the minor daughter Kamala, in addition to a maintenance allowance of Rs. 50 per month to her until she was married. Lachmi Narain, it should be noted, died on January 1, 1936. By the final decree, each of the sons obtained one-sixth share of the estate of Ram Kishori Lal. By reason of the death of Lachmi Narain before the final decree, Sumitra Devi got one-third share of the estate, one-sixth in her capacity as widow and one-sixth as the mother of her pre-deceased son. The allotment in favour of Sumitra Devi consisted mostly of house properties, and the four houses of her share with which we are concerned in this litigation were described in a schedule to the plaint and stood on Municipal Holding Nos. 16, 17, 26 and 27 of Circle 4 of the Asansol Municipality. The value of these four houses was found by the Commissioner at the time of partition to be in the neighbourhood of Rs. 19,000 only.

The marriage of Kamala Devi was settled with one Bijoy Kumar Sao, son of Nand Lal Sao, a retired Deputy Postmaster, Patna General Post Office. The case of the appellants was that the marriage was settled at Deoghar on Shivaratri day in 1938 and the plaintiffs, respondents before us, had no concern with the negotiation; it was alleged that the terms of the marriage settlement included a promise by Sumitra Devi of a gift of four houses at Asansol, worth about Rs. 20,000, as marriage dowry for Kamala. The further case of the appellants was that at the time of the marriage itself, which was performed on May 10, 1938, Sumitra Devi made a "sankalpa" of the gift of the four houses at Asansol, which was accepted by Nand Lal Sao on behalf of Kamala, and the gift was later confirmed on the occasion of the Dwiragaman (Gowna) ceremony which took place in December 1938 and possession of the houses was also given to her; soon after the marriage, however, Sumitra Devi fell ill and the deed of gift was actually executed and registered on March 10, 1940, some two years after the marriage. This was the deed of gift which was impugned by the plaintiffs-respondents.

The case of the plaintiffs-respondents was that the marriage negotiations took place at Asansol and did not contain any promise of the gift of four houses as marriage dowry. The plaintiffs-respondents alleged that the arrangements were that ornaments worth about Rs. 5,000 were to be given to Kamala Devi, a sum of Rs. 800 was to be paid as travelling expenses of the bridegroom's party, and gifts of some moveable properties were to be made out of the balance of the sum of Rs. 10,000 which was set apart for the marriage expenses of Kamala Devi. The plaintiffs-respondents denied that there was any ante-nuptial promise of a gift of four houses as marriage dowry or that there was any "sankalpa" at the time of marriage or any confirmation of the gift at the Dwiragaman ceremony. They alleged that Sumitra Devi, under the evil advice of her father and son-in-law and to deprive the plaintiffs-respondents of their right, made a gift of the four houses at Asansol in favour of Kamala Devi on March 10, 1940, a gift which she was not competent under the law to make. It was alleged that the gift was collusive, fraudulent and without consideration; and in any event, it could not be operative beyond the lifetime of Sumitra Devi and was not binding on the reversion, as she had only a life interest in the corpus of the property and there was no justifying legal necessity for the alienation made by her. It was also alleged that Sumitra Devi was not legally competent to make a gift, as marriage dowry of her daughter, of such a big and unreasonable portion of the estate left by her husband.

On the aforesaid pleadings of the parties, the principal issues were Issues Nos. 2 and 3 which were in these terms:

> "2. Is the defendant No. 1 competent to make any gift of the properties mentioned in the plaint beyond her lifetime to defendant No. 2? Is it void and inoperative against the plaintiffs beyond the lifetime of defendant No. 1?
>
> 3. Is the deed of gift executed by defendant No. 1 in favour of defendant No. 2 with the alleged collusive and fraudulent allegations binding on the plaintiffs on her death?"

It is necessary now to summarise the findings of the Courts below on these issues. On the questions of fact involved in the two issues, the learned Subordinate Judge came to the following findings:

> "(1) the marriage of Kamala Devi was settled at Deoghar as claimed by Mst. Sumitra Devi and not at Asansol; (2) there was, however, no promise of any gift by her of four houses at Asansol either at the time of the settlement of the marriage terms at Deoghar or during the marriage ceremony (3) the story of the delivery of possession of the houses to Kamala Devi was not supported by reliable evidence."

Basing his decision on the aforesaid findings of fact, the learned Subordinate Judge held that the interest created in favour of Sumitra Devi in respect of the properties allotted to her on partition was in the nature of an ordinary maintenance grant and she had no right to alienate the same in favour of her daughter. Even if she had the limited right of disposal, as in the case of a Hindu widow, she was not competent to execute any deed of gift, except with regard to a reasonable portion of the estate of her husband at the time of the marriage of Kamala Devi or on the occasion of the Gowna ceremony. Though the learned Subordinate Judge found that the properties given to Kamala Devi constituted a reasonable portion of the estate, he held that the gift not having been made at the time of the marriage or on the occasion of the Gowna ceremony in accordance with the provisions of section 123, Transfer of Property Act, was not binding on the plaintiffs-respondents and could not operate beyond the lifetime of Sumitra Devi. He accordingly decreed the suit.

The learned Judges of the High Court formulated five questions of fact, four of which are important for our purpose, and on a fresh consideration of the evidence on the record, came to the following findings thereon:

> "(1) a final settlement of the terms of marriage was made at Deoghar and the terms which were settled between the parties were: (a) that Sumitra Devi would arrange for the gift of ornaments worth about Rs. 5,000; (b) a sum of Rs. 800 would be paid for meeting the expenses of travelling of the bridegroom's party from Patna to Asansol, (c) a sum of Rs. 51 would be paid for the Tilak ceremony and (d) a gift of four houses at Asansol, worth about Rs. 20,000, would be made in favour of Kamala Devi, though the evidence led on behalf of the appellants did not make it absolutely clear or specific that the promise related to the four particular houses which were the subject-matter of the subsequent gift; (2) the plaintiffs-respondents had nothing to do either with the settlement of the terms of marriage or with any control or management of the marriage ceremony; (3) there was no reliable evidence that Sumitra Devi had made a "sankalpa" of the gift of the houses when the bride was given in marriage and the question of confirming such a gift at the Gowna ceremony did not therefore arise; (4) it was not proved by reliable evidence that the possession of the houses in question was made over to Kamala Devi before the actual execution of the deed of gift."

Relying on the decision in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[1], the learned Judges of the High Court pointed out that even in cases governed by the Mitakshara (the parties in this case are admittedly governed by the Benares school of Mitakshara law) the hare allotted to Sumitra Devi on partition was not her stridhan but stood on the same footing as property inherited by her from her husband and that on her death the property would pass not to her stridhan heirs but to the sons or grandsons. The learned Judges then referred to the decision in *Churaman Sahu* v. *Gopi Sahu*[1], and observed that though it was competent for a Hindu widow, governed by the Mitakshara, to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter subsequent to the marriage ceremony, the gift in *Churaman Sahu's case*[1] was made at the time of the Dwiragaman (Gowna) ceremony which was really a part of the marriage ceremony, while the gift in the present case was made some two years after the marriage. They then said :

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[1] (1912) 22 M.L.J. 462 : L.R. 39 I.A. 121 (P.C.).

> " In the case now before us the marriage and the Gowna ceremony took place in 1938 and the document was executed in March, 1940, the lapse of time between the two is too great to describe the gift to have been made on the occasion of either the marriage or the Gowna ceremony. No authority had been placed before us supporting a gift by a widow to a daughter except at the time or on the occasion of marriage ceremony. The ante-nuptial promise cannot be regarded as a gift having been made on the occasion of the marriage. Had it not been for the provisions contained in the Transfer of Property Act governing the Law of Gifts it might have been possible to consider the gift as having been made on the occasion of the marriage, the implementation of which was subsequent. In view of the strict provisions of the Transfer of Property Act we can only consider the gift to have been made at the time when the deed was executed and registered ".

On the question whether the gift in favour of Kamala Devi by Sumitra Devi was of a reasonable portion of her husband's properties, the learned Judges observed :

> "In the present case, the value of the houses gifted was just above Rs. 18,000 which was about a fourth of the value of each share allotted (*viz*., above Rs. 73,000). Even if the provision of Rs. 10,000 made in the partition decree for meeting the marriage expenses be taken into account, we cannot say that the value of the gifted houses was disproportionate or unreasonable ".

In the result, the High Court affirmed the decision of the learned Subordinate Judge and dismissed the appeal preferred by the defendants who are the appellants here.

It is necessary to state now the contentions which have been urged before us on behalf of the appellants, and they may be put in two main categories (*a*) contentions with regard to the findings of fact, and (*b*) contentions of law. Learned counsel for the appellants has impeached the concurrent finding of the Courts below that there was no " sankalpa " or promise of a gift of the four houses in question at the time of the marriage ceremony which, it was alleged, was followed by a confirmation of the gift at the Gowna ceremony. The finding has been impeached on the ground of a serious error of record said to have been committed by the High Court and on the ground of non-consideration of relevant evidence. It has been argued before us that the proper finding should have been that Sumitra Devi made a " sankalpa " of the gift of the four houses in question after the Sampradan ceremony on the occasion of the marriage of Kamala Devi and that the gift was accepted by Nand Lal on behalf of his minor daughter-in-law and that such a gift was again confirmed at the Gowna ceremony. The main contentions of law are three in number, firstly, it has been contended that even accepting the findings of the final Court of fact as correct, the gift being of a reasonable portion of the estate of Ram Kishori Lal Sao and in pursuance and fulfilment of an ante-nuptial agreement made by Sumitra Devi at the time of the final settlement of the marriage negotiations at Deoghar, was for the spiritual benefit of Ram Kishori Lal and valid in Hindu law ; any such lapse of time as occurred in the execution and registration of the deed of gift was immaterial, if the deed of gift was in fulfilment of the moral obligation flowing from the ante-nuptial agreement ; secondly, it was suggested that Sumitra Devi got an absolute right in the properties given to her as her share on partition ; thirdly, a reference was made to section 14 of the Hindu Succession Act, 1956 and it has been argued that in view of the said provisions the plaintiffs-respondents were not entitled to the reliefs which they claimed. It may be stated here that arguments in the case had concluded before the Court closed for the annual vacation in 1956 and during the vacation the Hindu Succession Act,

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1. (1909) I.L.R. 37 Cal. 1.

1956, came into force on June 17, 1956. On an application filed by the appellants, fresh arguments were heard with regard to the provisions of section 14 of the Hindu Succession Act, 1956.

We proceed now to deal with the contentions in the order in which we have stated them. First, we take up the contentions with regard to the findings of fact referred to above. It has been pointed out to us that the learned Judges of the High Court made a serious error of record in dealing with the oral evidence as to the verbal gift said to have been made at the time of the marriage of Kamala Devi and the acceptance of such a gift by Nand Lal, father-in-law of Kamala Devi. In dealing with the oral evidence on this question, the learned Judges have said :

> "If we leave out of account for the present the evidence of SumitraDevi andBijoy as also of Kamat who has been contradicted on a very materiai point by the other witnesses and also Nand Lal, father of Bijoy, we are left with Parasuram and Rash Behary. Parasuram, a tenant,happens to be present, at the psychological moment only for a few minutes when the Sankalpa is being made ".

The High Court clearly made a mistake in dealing with the evidence of Parasuram Sharma and confused Parasuram Sharma (witness No. 16) with Pashupati Sarkar (witness No. 10). Pashupati Sarkar was a tenant of Sumitra Devi and it was his evidence that he went to the place of marriage at about 12 midnight or 1. A.M. and stayed there for two minutes only and then came away. Parasuram Sharma (witness No. 16) was not a tenant of Sumitra Devi. He was the Head Master of the Indian H.E. School at Patna, a school where Bijoy, husband of Kamala, was a pupil for two years. This Head Master said that he attended the marriage as a member of the bridegroom's party and was present when from behind the purdah Sumitra Devi made a "sankalpa" of the gift of four houses ; this was conveyed by Ganapati Sastri who recited "mantras" and was accepted by Nand Lal. It is unfortunate that the High Court confused Parasuram Sharma (witness No. 16) with Pashupati Sarkar (witness No. 10), with the result that Parasuram Sharma's evidence was not properly considered by the High Court. This defect in the consideration of the evidence by the High Court is undoubtedly there. The point for consideration is if this is a sufficient ground for departure from the ordinary rule of this Court not to go behind the findings of a fact arrived at by the Courts below. Though the mistake made is unfortunate, we do not think that it is sufficient to disturb the finding of the Courts below or even to re-open the finding at this stage. It is worthy of note that the learned Subordinate Judge made no mistake about Pashupati and Parasuram. He pointed out that the witnesses examined on behalf of the appellants with regard to the verbal gift at the time of the marriage and its acceptance by Nand Lal, were mostly interested witnesses and none of them were really independent. Even Parasuram Sharma, whose evidence has been placed before us by learned counsel for the appellants, cannot be said to be completely independent. He was invited to attend the marriage as a member of the bridegroom's party and he said that he *overheard* Sumitra Devi saying that she was making a "sankalpa" of the gift of four houses as promised—evidence which is not of a very satisfactory nature. There were many other criticisms of the evidence regarding the verbal gift at the time of the marriage, the learned Judges of the High Court have referred to these criticisms and they accepted some of them. One of the criticisms which greatly weighed with the learned Subordinate Judge was the absence of any reference to the gift of four houses in contemporaneous Court proceedings with regard to the withdrawal of Rs. 10,000 by Sumitra Devi, the sum which was set apart by the partition decree for the marriage expenses of Kamala Devi. This criticism was not, however, fully accepted by the learned Judges of the High Court, who placed greater reliance on the evidence of Rai Saheb Jogendra Nath Roy (witness No. 14) who was the most respectable and reliable witness examined on behalf of the appellants. The evidence of this witness supported the evidence of Sumitra Devi with regard to the promise made regarding the gift of four Asansol houses at the time of the settlement of marriage negotiations at Deoghar. There can be no doubt that Rai Saheb Jogendra Nath Roy was a very respectable witness and had no reasons to tell lies. Though he supported that part of the evidence of Sumitra Devi which related to the promise of a gift of four houses at

Asansol at the time of the marriage negotiations at Deoghar, he made no statement about a verbal gift having been made at the time of the marriage itself. The witness said that he went to Sumitra Devi's house on the evening of the marriage and stayed for fifteen to twenty five minutes only. He further said that he was not present at the time of the marriage ceremony. It may therefore be that Rai Saheb Jogendra Nath Roy was not present at the time when the verbal gift was alleged to have been made.

By far and large, the learned Judges of the High Court did examine with care the oral evidence with regard to the alleged verbal gift at the time of the marriage and but for the unfortunate confusion between Parasuram Sharma and Pashupati Sarkar, we do not think that the consideration of the oral evidence by the High Court is open to any other serious criticism. The learned Judges rightly pointed out a serious discrepancy which existed between the evidence of Kamal Narayan Pandey (witness No. 8), who is said to have acted as the priest for the marriage, and the evidence of other witnesses with regard to the " legan " or time of marriage. Taking all these circumstances into consideration, we do not think that we shall be justified in going behind the finding of the Courts below that the appellants had failed to prove by satisfactory evidence that Mst. Sumitra Devi made a verbal gift of the four houses in question at the time of the marriage of her daughter Kamala Devi and that such a gift was accepted by Nand Lal on behalf of his minor daughter-in-law. In view of this finding, the question as to whether the gift was again confirmed at the time of the Gowna ceremony does not really arise. There can be no confirmation of an act which did not itself take place.

As the appellants have impeached the finding of the Courts below with regard to the verbal gift said to have been made at the time of the marriage, the respondents have also impeached before us the finding of the High Court about an ante-nuptial agreement said to have been made at Deoghar. It has been contended by learned counsel for the respondents that there were no compelling reasons for the High Court, which was the appellate Court, to differ from the appreciation of the oral evidence by the learned Subordinate Judge, who had the advantage of seeing the witnesses, with regard to the question of the ante-nuptial agreement said to have been made at Deoghar. It is true that the learned Subordinate Judge did not accept the evidence of the witnesses who testified to the terms of settlement of the marriage negotiations at Deoghar. What tipped the scale in favour of the finding arrived at by the High Court on this point was the evidence of Rai Saheb Jogendra Nath Roy (witness No. 14). The learned Subordinate Judge gave certain reasons for not accepting the evidence of this witness. The learned Judges of the High Court considered those reasons very carefully and rightly pointed out that there were no good grounds for thinking that Rai Saheb Jogendra Nath Roy had fallen a victim to lapse of memory or for holding that he was an interested witness. The evidence of Rai Saheb Jogendra Nath Roy was considered in the context of contemporaneous Court proceedings for the withdrawal of Rs. 10,000 and the learned Judges of the High Court accepted the explanation which Rai Saheb Jogendra Nath Roy gave for not mentioning the promise of a gift of four houses in Asansol in the application which Sumitra Devi made for the withdrawal of the said sum of Rs. 10,000. In our opinion, the finding of the High Court as to an ante-nuptial agreement for the gift of four houses at Asansol, worth about Rs. 20,000 is not vitiated by any error of fact or law. That finding must therefore be accepted as a correct finding, even though the learned Subordinate Judge came to a contrary conclusion with regard to it.

Having disposed of the contentions of fact urged before us, we proceed now to a consideration of the contentions of law. It may be convenient to dispose of, first, the argument somewhat faintly advanced on behalf of the appellants that even prior to the enactment of the Hindu Succession Act, 1956, Sumitra Devi had an absolute right of disposal in the share allotted to her on partition in 1933-1936 under Mitakshara Law. The question whether the share allotted to a mother on partition is stridhan or not, according to the Benares school, was left open by their

Lordships of the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee*[1], the very case in which they held that property inherited by a woman was not stridhan according to the Mitakshara. In *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2], the Allahabad High Court, after a review of all the authorities on the subject, held that it was stridhan ; but the Privy Council held that it stood on the same footing as property inherited by a woman and that it was not stridhan. The actual point decided in *Debi Mangal Prasad's case*[2], was that there was no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It is worthy of note that the partition decree proceeded on the footing that Sumitra Devi would be entitled to the income from the properties allotted to her but should not be in a position to prejudice the reversioners by destroying the corpus. The preliminary decree for partition stated :

> "The Commissioner is further directed to allot as little liquid cash to the share of plaintiff No. 2 (Sumitra Devi) as possible on partition and as a rule should allot such properties to her share of which she may receive income without trouble, but may not prejudice the reversioners by destroying the corpus."

It follows, therefore, that under the Mitakshara Law and also under the partition decree, Mst. Sumitra Devi did not have an absolute right or interest in the share allotted to her on partition. Under the decision in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2], the property allotted to Mst. Sumitra Devi on partition stood on the same footing as property inherited by her from her husband. She had no absolute right of disposal of the property.

This brings us to a consideration of the principal point argued before us on behalf of the appellants, namely, whether Sumitra Devi was competent to make a gift of a reasonable portion of the estate of her husband to her daughter Kamala Devi as a marriage dowry in pursuance and fulfilment of an ante-nuptial agreement, even though the gift was made some two years after the marriage ceremony. This point was urged before us, as we have already stated, prior to and irrespective of the enactment of the Hindu Succession Act, 1956. The argument of learned counsel for the appellants was that Sumitra Devi was competent to make such a gift under the Hindu Law, even as it stood prior to the enactment of the Hindu Succession Act, 1956. We shall therefore deal with this point, irrespective of the provisions of section 14 of the Hindu Succession Act, 1956.

It may be stated at the very outset that the concurrent finding of the Courts below was that the gift of four houses at Asansol, of a value of about Rs. 19,000 was not disproportionate or unreasonable if one had regard to the large extent of properties left by Ram Kishori Lal Sao on his death ; this was so even taking into consideration the sum of Rs. 10,000 which was set apart for the marriage expenses of Kamala Devi and which was withdrawn by Sumitra Devi. In our opinion, that finding is correct and must be accepted as such. Therefore, the narrow question is if Sumitra Devi was competent to make the gift of four houses at Asansol as marriage dowry to her daughter, some two years after the marriage, in pursuance and fulfilment of the ante-nuptial agreement made at Deoghar.

There are a number of decisions bearing on the question, to which our attention has been drawn by learned counsel for the parties, and we propose now to examine some of them. In *Sardar Singh* v. *Kunj Behari Lal*[3], it was observed :

> "There can be no doubt upon a review of the Hindu Law, taken in conjunction with the decided cases, that the Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges...............With reference to the first class of acts, the powers of the Hindu

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1. (1868) 11 M.I.A. 487, 514.
2. (1912) 22 M.L.J. 462 : L.R. 39 I.A. 121 (P.C.).
3. (1922) 44 M.L.J. 766 : L.R. 49 I.A. 383 (P.C.).

> female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view ".

In a very early decision, *Cossi Naut Bysack* v. *Hurroo Soondry Dossee*[1], which was heard by the Supreme Court at Calcutta in 1819 and by the Judicial Committee in 1826, and quoted in *Churaman Sahu* v. *Gopi Sahu*[2], it was stated by Lord Gifford that a Hindu widow had

> " for certain purposes a clear authority to dispose of her husband's property and might do it for religious purposes, including dowry to a daughter ",

There are several texts which lay down that it is the imperative religious duty and a moral obligation of a father, mother or other guardian to give a girl in marriage before she attains puberty. Some of these texts have been quoted in *Churaman Sahu's case*[2] and *Ram Sumran Prasad* v. *Gobind Das*[3]. According to these texts, the marriage of a girl by her father in enjoined as a religious duty in order to prevent him from being degraded and visited with sin ; there is also direct spiritual benefit conferred upon him by such a marriage. Marriage, according to the Sastras, is a religious act ; a sanskara for a man or woman. According to Manu, Chapter II, verse 67, the sacrament of marriage is to a female what initiation with the thread is to a male. The Mitakshara also recognises marriage as a religious obligation for both male and female (*Sundrabai Javji Daadu Pardeshi* v. *Shivnarayana Ridkarna*[4].) The texts also recognise that gifts can be made at the time of or on the occasion of the marriage or any ceremonies connected therewith, and may also be made in fulfilment of a promise made in connection with the marriage ; some decisions have gone to the extent of laying down that the moral obligation continues till it is discharged or fulfilled and such fulfilment may be subsequent to the marriage : see Mitakshara, chapter I, section VII, placitum 5 to 14. In placitum 9 is quoted Manu's text :

> " To the maiden sisters, let their brothers give portions out of their own allotments respectively ; to each the fourth part of the appropriate share ; and they, who refuse to give it, shall be degraded."

In Placitum 11, it is stated :

> " If it be alleged, that, here also, the mention of a quarter is indeterminate, and the allotment of property sufficient to defray the expenses of the nuptials is all which is meant to be expressed the answer is, no; for there is not any proof, that the allotment of a quarter of a share is indefinite in both codes ; and the withholding of it is pronounced to be a sin ".

In *Ramasami Ayyar* v. *Vengidusami Ayyar*[5], it was observed with reference to the aforesaid passages in the Mitakshara, and also to certain passages in the Smriti Chandrika, wherein the texts of Manu, Yajnavalkya and other Smriti writers dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition, were commented upon, that with regard to the true meaning of those texts commentators were divided : some of them held that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate but other commentators, Vijnaneswara among them, laid down that inclusive of their marriage expenses sisters were entitled to a provision not exceeding a fourth of what they would have got had they been males. It was further observed therein that it was not necessary to decide which of the two views was to be taken as law. Subramania Ayyar, J., then said :

> " Assuming that, as argued for the appellant, the view advocated by Vijnaneswara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favourable to maiden daughters, ought to make one hesitate to accept as sound the exceedingly limited construction which was insisted on on behalf of the appellant and which can scarcely be said to be in itself very reasonabale, *viz.*, that the texts justify a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage. In my opinion, the better and sounder view is, as contended for the respondents, that the authorities should be under-

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[1] 2 Morley's Digest 198.

[2] (1909) I.L.R. 37 Cal. 1.

[3] (1926) I.L.R. 5 Pat. 646, 681, etc.

[4] (1907) I.L.R. 32 Bom 81.

[5] (1898) 8 M.L.J. 170 : I.L.R. 22 Mad. 113.

stood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs ".

It should be noted that the observations aforesaid were made in a case where a widow gave her daughter in marriage and at the time of the marriage made a gift of a portion of the lands inherited by her from her husband to her son-in-law, and the question was if the widow Thaiyyu Ammal, who was a Hindu qualified owner, had authority to make such a gift.

In *Kudutamma* v. *Narasimha Charyulu*[1], the brother, as managing member of the joint family, made a gift of a reasonable portion of the joint family properties to his sisters. The sisters were married in the father's lifetime but were left for some reason or other without a marriage portion. The gift was made after the father's death and subsequent to the marriage. It was held that the brother had authority to make the gift. Miller, J., observed :

> " If then a brother, finding that his sister, though married in his father's lifetime, has been for any reason left without a marriage portion which she ought to have received, it is difficult to see how he can be held to have exceeded his powers if he makes good the deficiency out of the family property. We are not required to hold that he is bound to do so ; we are not required to hold that his father was bound in law to give his daughter anything at her marriage ; it is only necessary for us to hold that the gift is not in excess of the powers of the brother and cannot therefore be recalled by him or avoided by his son ".

Wallis, J., who concurred in the judgment, observed :

> " In such a case there was, I think, a strong moral obligation on the joint family over the father as managing member to make a gift out of the joint family property on the occasion of the marriages either to the girls themselves or to their husbands as a provision for them, and the fact that the father maintained both the daughters and their husbands out of the joint family property until his death may be regarded as a continuing recognition of such moral obligation. Mere neglect on the part of the joint family to fulfil a moral obligation at the time of the marriages cannot, in my opinion, be regarded as putting an end to it, and I think it continued until it was discharged by the deed of gift now sued on and executed after the father's death by his son, the 1st defendant, who succeeded him as managing member of the joint family ".

In *Churaman Sahu's case*[2] the gift was no doubt made on the occasion of the daughter's *gowna* ceremony which took place some two years after the marriage, and it was held that the *gowna* ceremony was a ceremony of importance, closely connected with the marriage, though it was not a ceremony necessary to complete the marriage. The gift was upheld on that footing. What is worthy of note, however, is that in *Churaman Sahu's case*[2] the decision in *Kudutamma* v. *Narasimha Charyulu*[3], was approved, and that was a decision in which the gift was made subsequent to the marriage and not on the occasion of any particular ceremony.

Sundararamayya v. *Sitamma*[4] is another decision of some importance. There the marriage took place about forty years before the gift and there was no evidence that the father had any intention to give any property at the time of the marriage. The question was if in those circumstances the gift was valid. After referring to the decisions in *Churaman Sahu* v. *Gopi Sahu*[2] and *Ramaswami Ayyar* v. *Vengidusami Ayyar*[5], it was observed :

> " We see no reason to differ from these two decisions. The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage but only some time later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899 ".

The learned Judges referred with approval to the earlier decision in *Kudutamma* v. *Narasimha Charyulu*[1]. The decision in *Bhagwati Shukul* v. *Ram Jattan Tewari*[6], is somewhat out of the ordinary in the sense that a widow transferred the entire property inherited by her from her husband to a blind and crippled daughter in

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1. (1907) 17 M.L.J. 528.
2. (1909) I.L.R. 37 Cal. 1.
3. (1907) 17 M.L.J. 528.
4. (1911) 21 M.L.J. 695 : I.L.R. 35 Mad. 628.
5. (1898) 8 M.L.J. 170 : I.L.R. [illegible] Mad. 113.
6. A.I.R. 1922 All. 381.

order to get her married and supply her with a handsome dowry. It was observed that no hard and fast rule could be laid down to define the extent and limit of the widow's power of disposing of the property inherited by her for the marriage of her daughter. The decision of the same case when it went up in Letters Patent appeal is reported in *Bhagwati Shukul* v. *Ram Jattan Tiwari*[1]. The decision of the single Judge was upheld on the ground that in order to get the girl married, it was " a sheer necessity " for the widow to provide a dowry of Rs. 500 or its equivalent by the gift of the property. The property was very small in value, being in the neighbourhood of Rs. 500 only, and where under the circumstances the marriage of the girl into a suitable Brahmin family, having regard to her blindness and infirmity, necessitated the spending of the equivalent in value of the property, then the alienation was a " sheer legal necessity ". It should be observed here that this decision is on its peculiar facts, and other decisions do not support the view that an alienation of the entire property is permissible : most of the decisions lay down that an alienation of a reasonable portion of the property is only permissible. What is reasonable must depend on the facts and circumstances of each case.

In *Vettor Ammal* v. *Pooch Ammal*[2], the gift was made some years after the marriage. The gift was upheld and was held to be reasonable being about one-sixth of the whole property. In *Sailabala* v. *Baikuntha Nath*[3], a gift made by a widow of twelve annas share of her husband's estate on the occasion of the marriage of her daughter was supported on the ground that it was impossible to define the extent and limit of the widow's power of disposing of property inherited by her because it must depend upon the circumstances of the disposition whenever such disposition was made. In *Ram Sumran Prasad* v. *Gobind Das*[4] the gift was made on 28th July, 1901, but the marriage took place in 1899, two years earlier. The gift was made in pursuance of an earlier promise and a verbal declaration made at the time of the Gantha Pakrai (catching hold of the skirt of the mother-in-law) performed during the marriage. On an exhaustive review of the decisions, the case-law was summarised as follows :

> " The case-law on the subject summarised above fully indicates the inclination of all the High Courts to uphold a gift by a widow of *landed property* to her daughter or *son-in-law* on the occasion of the marriage or any ceremonies connected with the marriage and that the promise made may be fulfilled afterwards ; and it is not essential to make a gift at the time of the marriage but that it may be made afterwards, upon the ground that the gift when made fulfils the moral and religious obligation of giving a portion of the property for the benefit of the daughter and the son-in-law. The only limitation placed upon this power of making a gift is that it should bear a reasonable proportion to the entire property of the deceased father and that it should be justifiable in the circumstances of the case in terms of the principle laid down in *Cossinaut Bysack* v. *Hurrosoondry Dossee*[5] ".

In *Sithamahalakshmamma* v. *Kotayya*[6], Mr. Justice Venkataramana Rao summarised the case-law in the following words :

> " Thus it will be seen that it is competent to a Hindu father to make a gift of a reasonable portion of the ancestral immoveable property to his daughters without reference to the son..............It is a power vested in the father under the Hindu Law, which he can exercise subject to the restriction of limitations imposed on him by the said law. The decided cases have held that the gift must be a reasonable one. The question whether a particular gift is reasonable or not will have to be judged according to the state of the family at the time of the gift, the extent of the family immoveable property, the indebtedness of the family, and the paramount charges which the family was under an obligation to provide for ; and after having regard to those circumstances if the gift can be held to be reasonable such a gift will be binding on the joint family members irrespective of the consent of the members of the family..............If under the law it is a moral obligation on the family to make a provision as and by way of a marriage portion and such obligation continues until it is fulfilled by a reasonable provision being made therefor, the fact that one of the sons has become indebted cannot take away the power of the father to make such a gift............ ".

In *Pratap Kunwar* v. *Raj Bahadur Singh*[7], the marriage took place in 1923 and the gift was made in 1926. After examining the evidence the learned Judges held that Mst. Raj Kuer, the widow in question, did not make any " sankalpa " of the gift of fifteen villages at the time of her daughter's marriage. On behalf of the plaintiffs it was argued before them that a Hindu widow could make a gift of her husband's immoveable property to her daughter only at the time of her marriage. The learned Judges repelled this contention and held that the gift made by Mst. Raj Kuer in favour of her daughter and son-in-law was valid, even though she did not make a "sankalpa" at the time of marriage In *Abhesang Tirabhai* v. *Raisang*[1], it was held that gifts by a Hindu widow on the occasion of her daughter's marriage are valid as they are understood in Hindu Law to conduce to the spiritual benefit of the widow's husband. In *Ramalinga Annavi* v. *Narayana Annavi*[2], a father made a gift to his daughter of a sum of Rs. 5,000 and a usufructuary mortgage. It was held that the father had undoubtedly the power under the Hindu Law of making within reasonable limits gifts of immoveable property to a daughter, similarly, gifts of sums of money, if reasonable, would be upheld.

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[1] I.L.R. (1923) 45 All. 297.

[2] (1912) 22 M.L.J. 321.

[3] A.I.R. 1926 Cal. 486.

[4] (1926) I.L.R. 5 Pat. 646.

[5] (1819) 2 Morley's Digest 198.

[6] (1936) 71 M.L.J. 259 : A.I.R. 1936 Mad. 825.

[7] A.I.R. 1943 Oudh 316.

As against the very large number of decisions referred to above, the only decision which can be said to strike a dissentient note is the decision in *Ganga Bisheshar* v. *Pirthi Pal*[3]. That was a case in which one Debi Prasad executed a deed of gift of a certain share in a certain village, being the ancestral property of his family, in favour of the defendants Ganga Bisheshar the father-in-law of his daughter, on April 25, 1872, about two years after the marriage of the daughter. Spankie, J., observed as follows :

> "I understand the finding of both the lower Courts to be that the transfer was not made for any necessary purpose allowed by the Hindu Law. The deed of gift appears to have been made by the father in performance of a promise to give a dowry to his daughter. But I am not aware that the performance of such a promise can be regarded as a lawful purpose justifying alienation under the Hindu Law. It was not necessary for the support of the daughter, it was not for any religious or pious work, nor was it a pressing necessity. Daughters must be maintained until their marriage and the expenses of their marriage must be paid. But in this case the gift was not made at the time of the marriage. It was not executed until two years after the marriage."

There is no consideration, nor any discussion, of the texts bearing on the question, and the learned Judge did not consider the alienation from the point of view that the marriage of the daughter was a religious duty and the promise to make a gift to the daughter as her marriage portion created a moral or religious obligation in fulfilment of which it was competent for the father to execute a deed of gift in favour of the daughter of a reasonable portion of the estate.

On an examination of the decisions referred to above, the following principles clearly emerge : (1) It is the imperative religious duty and a moral obligation of a father, mother or other guardian to give a girl in marriage to a suitable husband ; it is a duty which must be fulfilled to prevent degradation, and direct spiritual benefit is conferred upon the father by such a marriage. (2) A Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory but are still pious observances which conduce to the bliss of the deceased husband's soul. (3) In the case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it ; but for acts which are pious and which conduce to the bliss of the deceased husband's soul, she can alienate a reasonable portion of the property. (4) Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage, are well recognised in Hindu Law. (5) If a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards in fulfilment of the promise. (6) Some decisions go to the length of holding that there is a moral or religious obligation of giving a portion of the joint family property for the benefit of the daughter and the son-in-law, and a gift made long after the marriage may be supported upon the ground that the gift when made fulfils that moral or religious obligation.

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[1] (1912) 14 Bom. L.R. 602. (P.C.).

[2] (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 : A.I.R. 1922 P.C. 201

[3] (1800) I.L.R. 2 All. 635.

In the case before us, it is not even necessary to go to the extent to which the decisions covered by the last item stated above (item 6) have gone. The finding of the final Court of fact is that there was an ante-nuptial agreement by Mst. Sumitra Devi that she would give four houses at Asansol, of the value of Rs. 20,000 to her daughter as marriage dowry. It was open to Mst. Sumitra Devi to fulfil that promise as a religious act which conferred spiritual benefit upon her deceased husband, irrespective of the consideration whether she made a "sankalpa" at the time of the marriage or not. We have already stated that we concur in the finding of the Courts below that the gift was neither disproportionate nor unreasonable in extent.

The learned Judges of the High Court referred to section 123 of the Transfer of Property Act which lays down that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. In one part of their judgment, they said that but for the aforesaid provisions it might have been possible to consider the gift as having been made on the occasion of the marriage the implementation of which was subsequent. In our opinion, the learned Judges of the High Court were in error with regard to the scope and effect of section 123 of the Transfer of Property Act. It is true that a gift becomes legally effective only when a registered instrument is executed in the manner laid down in that section. Section 123 does not deal with nor does it affect the power of a Hindu widow to make an alienation of a reasonable portion of her husband's estate in favour of the daughter as marriage dowry. That right is governed by Hindu Law and it is open to a widow to make an effective gift in favour of her daughter subsequent to the marriage, if the conditions laid down by Hindu Law are fulfilled.

For the reasons given above, we hold that the alienation made by Mst. Sumitra Devi in favour of her daughter Kamala Devi on March 10, 1940, was valid and binding on the reversioners. The decision of the High Court to the contrary was erroneous in law.

We now turn to the Hindu Succession Act, 1956, which came into force on June 17, 1956. Section 14, on which learned counsel for the appellants has relied, is in these terms :—

> "(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> *Explanation.*—In this sub-section, 'property' includes both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, of by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property".

There is no doubt that by reason of the use of the expression "whether acquired before or after the commencement of this Act" the section is retrospective in effect. The *Explanation* to the section shows that "property" includes immoveable property acquired by a female Hindu at a partition or by gift from any person, whether a relative or not before, at or after her marriage. The argument of learned counsel for the appellants is twofold. He has contended that the four houses in question are now in the possession of Kamala Devi and under section 14, Kamala Devi is a full owner of the houses ; the plaintiffs-respondents cannot therefore get the declaration which they have asked for. Alternatively, he has contended that if Sumitra Devi is still in possession of the houses, she also becomes a full owner and in that event also the plaintiffs-respondents are not entitled to the reliefs claimed. Learned counsel for the respondents has relied on sub-section (2) of section 14 which says that nothing in sub-section (1) shall apply to any property acquired by way of gift, etc., where the terms of the instrument or decree, etc., prescribe a restricted estate in such property. It is argued that Sumitra Devi got a restricted estate by the partition decree and sub-section (1) has no application to that estate. It is further argued that Kamala Devi as donee could not get a larger estate than what the donor had in the property, if the view of Hindu Law, as contended for by learned counsel for the respondents, is accepted as correct; therefore, Kamala Devi is also not entitled to the benefit of sub-section (1) of section 14.

We do not think that it is necessary to decide this case on the rival contentions presented to us with regard to section 14 of the Hindu Succession Act, 1956. We have already held that under Hindu Law Mst. Sumitra Devi could make a gift in favour of her daughter as marriage dowry, two years after the marriage, in fulfilment of the ante-nuptial promise made by her and that such a gift is binding on the reversioners. That being the position, it is unnecessary to decide in this case the true scope and effect of section 14 of the Hindu Succession Act, 1956.

For the reasons given above, we allow the appeal and set aside the judgment and decree of the Courts below. The suit of the plaintiffs-respondents must be dismissed and the appellants will be entitled to their costs throughout.

Appeal allowed.

SUPREME COURT OF INDIA.

PRESENT:—S. R. DAS, *Chief Justice*, N. H. BHAGWATI, T. L. VENKATARAMA AYYAR, B. P. SINHA AND S. K. DAS, JJ.

Lalit Mohan Das .. *Appellant**

v.

Advocate-General, Orissa and another .. *Respondents.*

Legal Practitioners Act (XVIII of 1879), sections 13 and 14—Misconduct—Test—Rights and duties of member of Bar to his client and Court—Criticism of presiding officer—Limits to right of.

A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct or may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the Court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute.

Where a member of the Bar makes imputations of partiality and unfairness against the Munsif in open Court, he must be held to have grossly overstepped the limits of propriety. In suggesting that the Munsif followed no principle in his order he was adding insult to injury. Scandalising the Court in such a manner is really polluting the very fount of justice; such conduct was not a matter between an individual member of the Bar and a member of the judicial service; it brought into disrepute the whole administration of justice and that conduct is highly reprehensible.

Appeal by special leave from the Judgment and Order, dated the 15|23rd March, 1955, of the Orissa High Court in Civil Reference No. 4 of 1954.

N. C. Chatterji, Senior Advocate (*D. N. Mukherjee* and *R. Patnaik*, Advocates, with him) for Appellant.

Porus A. Mehta and *R. H. Dhebar*, Advocates for Respondent No. 1.

The Judgment of the Court was delivered by

S. K. Das, J.—The appellant is Shri Lalit Mohan Das, a pleader of about 25 years' standing, who ordinarily practised in the Courts at Anandapur in the district of Mayurbhanj in Orissa. The Munsif of Anandapur, one Shri L. B. N. S. Deo, drew up a proceeding under sections 13 and 14 of the Legal Practitioners Act, 1879, against the pleader for grossly improper conduct in the discharge of his professional duty and submitted a report to the High Court through the District Judge of Mayurbhanj on 12th December, 1953. The District Judge forwarded the report, accompanied by his opinion, to the High Court of Orissa on 9th March, 1954. The recommendation of the Munsif was that the pleader should be suspended from practice for one year. The reference was heard by the High Court of Orissa, and by its order dated 15th March, 1955, the High Court came to the conclusion that the pleader was guilty of grave professional misconduct and suspended him from practice for a period of five years with effect from 15th March, 1955.

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* C.A. No. 176 of 1956. (W.P. No. 165 of 1955.) 29th November, 1956.

Shri Lalit Mohan Das then obtained special leave from this Court to appeal against the judgment and order of the Orissa High Court dated the 15th|23rd March, 1955. He also filed a petition under Article 32 of the Constitution. Learned counsel for the petitioner has not pressed the petition under Article 32 and nothing more need be said about it. We proceed now to deal with the appeal which has been brought to this Court on special leave.

The charges against the appellant were the following. On 15th July, 1953, the appellant was appearing on behalf of the defendant in Suit No. 81 of 1952 pending before the Munsif of Anandapur. On that date, there were two other suits pending before the same Munsif. There were petitions for time in all the three suits. The Munsif wanted to take up the oldest suit for hearing, and the oldest suit being Suit No. 54 of 1952, it was taken up first and five witnesses for the plaintiff were examined. Suit No. 81 of 1952 was postponed to 18th August, 1953. The appellant, who appeared for the defendant in that suit, was informed of the postponement. When so informed, the appellant made a remark in open Court and within the hearing of the Munsif to this effect: "If the Peshkar is gained over, he can do everything". He then left the Court. The Munsif was surprised at the remark made and asked the appellant to explain his conduct, by means of a letter sent the same day. As the appellant sent no reply, the Munsif wrote again to the appellant on 18th July, 1953. To this letter the appellant sent the following reply:

> "DEAR SIR,
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> I am painfully constrained to receive memo. after memo. for some imaginary act of mine not in any way connected with my affairs for which if any explanation is at all warranted officially.
>
> For your second memo. I felt it desirable as a gentleman to reply.
>
> Further I may request you to be more polite while addressing letters to lawyers.
>
> Yours faithfully,
> (Sd.) L. M. Das, Pleader"

It is obvious that the letter of the appellant was couched in very improper terms and considerably strained the relation between the Munsif and the appellant. The appellant, it may be stated here, was at that time the President of the Anandapur Sub-Divisional Bar Association which consisted of about 14 legal practitioners. On 21st July, 1953, Shri B. Raghava Rao, who was the predecessor in office of Shri Deo, came to Anandapur. He was the guest of Shri A. V. Ranga Rao, the Sub-Divisional Officer. One Shri N. C. Mohanty, a pleader of Anandapur and who was related to the appellant, came to invite the two Munsifs to a luncheon on the occasion of a house warming ceremony. On hearing about the trouble between Shri Deo and the appellant Shri B. Raghava Rao interceded and it appears that the appellant was persuaded to come to the house of the Sub-Divisional Officer and to say that he was sorry for what had happened in Court on 15th July, 1953 and that he did not mean to insult Shri Deo; Shri Deo, it appears, accepted the apology and for the time being the trouble between the two was smoothed over.

A second incident, however, took place on 25th Septembr, 1953. The appellant was appearing for a defendant in another suit before the Munsif. It was Suit No. 101 of 1952. This suit was fixed for hearing on 21st September 1953. As that date was a holiday, the suit was taken up on 22nd September, 1953. Another suit, Suit No. 86 of 1952, was also fixed for hearing on that date but Shri N. C. Mohanty, pleader for the defendants in that suit, took time on the ground of the illness of one of the defendants, which ground was supported by a medical certificate. In Suit No. 101 of 1952 also, the defendants applied for time on the ground of illness of their witnesses: but there being no medical certificate in support of the allegation of illness and no witnesses having been summoned in that suit, the learned Munsif refused to grant time, and one Shri P. N. Patnaik who also represented the defendants agreed to go on with the suit. The suit was then heard for two days, *i.e.*, on the 22nd and 23rd September, 1953, and at the request of the defendants' lawyers the hearing of arguments was postponed to 25th September, 1953. On that date the appellant came to Court accompanied by his junior Shri P. N. Patnaik, for the purpose of arguing the case on behalf of the defendants. At the very outset of his arguments the appellant made the following remarks: "The Court is unfair to me, while the Court was fair to Mr. Misra (meaning Shri Bhagabat Prasad Misra who was appearing for the plaintiffs in that suit). The Court is accommodating and granting adjournments to Mr. Misra while it was not accommodating me". The Munsif took objection to these remarks but nothing untoward happened. The appellant concluded his arguments.

A third incident brought matters to a climax, and this incident took place on 29th September, 1953. The appellant was appearing for the defendants in Suit No. 6 of 1951. In that suit a preliminary point of jurisdiction and sufficiency of court-fees was raised and Shri B. Raghava Rao, the predecessor in office of Shri Deo, had dealt with the point and decided it against the appellant's client. A Civil Revision taken to the High Court was also rejected. The appellant, however, again pressed the same preliminary point and on 29th September, 1953, Shri Deo passed an order dismissing the preliminary objection. When this order was shown to the appellant, he stood up and shouted at the top of his voice—"I on behalf of the Bar Association, Anandapur, challenge the order of the Court. The Court has no principle as it is passing one kind of order in one suit and another kind of order in another suit". The Munsif, it appears, was disgusted at the conduct of the appellant and he stood up and left the Court room, directing the Bench Clerk to send a telegram to the District Judge. A telegram was accordingly sent to the District Judge asking him to come to Anandapur. The District Judge asked for a detailed report which was sent on 1st October, 1953. On 5th October, 1953, the Munsif drew up a proceeding against the appellant on a charge under section 13 of the Legal Practitioners Act referring therein to the three incidents mentioned above. The appellant was asked to show cause by 26th October, 1953. On 3rd November, 1953, the appellant denied the allegations made and took up the attitude that the Munsif was not competent to hold the enquiry on the ground that the Munsif was in the position of a complainant. The appellant gave a different version of what happened on the three dates in question. With regard to the incident of 15th July, 1953, the appellant's plea was that some other client had come to him in connection with a criminal case pending in another Court and to that client the appellant had said that an enquiry should be made from the Peshkar as to the date fixed. With regard to the incident on 25th September, 1953, the plea of the appellant was a total denial, and with regard to the last incident, the appellant said that the Munsif behaved rudely and wanted to assault the appellant, for which the appellant appears to have filed a petition to the Governor of Orissa on 30th September, 1953 for according sanction for the prosecution of the Munsif.

It may be stated here that on 8th October, 1953 a resolution was passed, numbered Resolution 6, which purported to be a resolution on behalf of the Bar Association, Anandapur. The resolution was in these terms:

> "Resolved that on 29th September, 1953, the Court's (Munsif) action on the dais in rising from the chair, thumping on the table, shouting at the top of his voice, and using the words 'shut up, against one honourable member (President) of this Bar Association is quite unprecedented, undesirable and affecting the prestige of the Bar and may cause apprehension in the mind of the litigant public to get fair justice".

It may be stated that some other members of the Bar dissociated themselves from the aforesaid resolution at a later date. The proceeding against the appellant under the Legal Practitioners Act started, as we have said earlier, on 5th October, 1953, and the appellant filed his written statement on 3rd November, 1953. On 5th November, 1953, the Munsif sent the record to the District Judge in connection with the plea of the appellant that the enquiry should be made by some other judicial officer. The District Judge, however, took the view that under the provisions of sections 13 and 14 of the Legal Practitioners Act the enquiry should be made by the Munsif himself and the records were accordingly sent back to the Munsif. Thereafter, the appellant non-co-operated and did not appear at the enquiry though more than one communication was sent to him. The enquiry was concluded on 11th December, 1953 and the Munsif submitted his report to the High Court through the District Judge on 12th December, 1953. On 22nd December, 1953, the appellant filed an application to the Additional District Judge for time to move the High Court to get an order to have the matter heard by some other judicial officer. One month's time was accordingly granted and the Additional District Judge, for some reason which is not very apparent, sent the record back to the learned Munsif. In the meantime, the Additional District Judge, it appears, made an effort to settle the trouble. On 23rd December, 1953, he met the members of the Bar Association and the Munsif at the inspection bungalow at Anandapur on his way to Mayurbhanj. At a meeting held there, a copy of a draft resolution to be passed by the members of the Bar Association, Anandapur, was made over. This draft resolution was in these terms:

> "This Association regrets very much that an incident relating to the Bench Clerk of the Civil Cour should have led to the subsequent unhappy differences between the Bench and the members of the Bar As in the interest of the litigant public it is felt not desirable to allow these strained feelings to continue further, this Association unanimously resolves to withdraw Resolution No. 6, dated 8th October, 1953, passed against the Court and communicate copies of the same to the addressees previously communicated. It is further resolved to request the Court to see to the desirability of withdrawing the proceedings that had been started against the various members of the Bar and their registered clerks on their expressing regret to the Court individually in connection with those proceedings. It is further resolved that the members of the Bar involved in the proceedings be reequested to take immediate steps in this direction. The Association hopes that the Bench clerk who has to some extent been the cause for this friction between the Bench and the Bar would be replaced by a person from a different place at an earlier date".

On 8th January, 1954, the appellant appeared in the Court of the Munsif and filed a written apology and expressed his regret. His signature was taken on the order sheet and the order of that date reads:

> "Sri L. M. Das, pleader, appears and expresses his regret. So the proceeding No. 2 of 1952 is dropped. Intimate Additional District Judge".

No resolution, however, was passed in the terms suggested by the Additional District Judge. On January 19, 1954, two resolutions were passed in the following terms:

> "No. 1. In view of the fact that past misunderstandings between the Munsif and members of the Bar caused by an incident relating to the Bench Clerk of the Civil Court, have been removed by amicable settlement of differences existing between both parties, it is unanimously resolved that

Resolution No. 6, dated 8th October, 1953, stands withdrawn. No. 2. It is further resolved that the copies of the above resolution be sent to the addressees previously communicated of resolution No. 6 of 8th October, 1953".

The learned Munsif, it appears, wanted to see the Minute Book of the Bar Association, presumably to find out in what terms the proposed resolution was passed. There was again trouble between the Munsif and the appellant over the production of the Minute Book. Ultimately, the Minute Book was produced, and on 2nd February, 1954, the Munsif expressed the view that the resolution passed did not fully carry out the terms of settlement suggested by the Additional District Judge. Accordingly, the proceeding was re-opened and the record was re-submitted to the District Judge. The District Judge thereupon sent the report of the Munsif to the High Court accompanied by his opinion. The High Court dealt with the report with the result which we have already indicated.

The main contention of Mr. N. C. Chatterji, who has appeared on behalf of the appellant, is this. He has submitted that there was no valid reason for reviving the proceeding against the appellant, after the proceeding had been dropped on 8th January, 1954, on the submission of an apology and expression of regret by his client; because in substance and effect, the terms of the settlement suggested by the Additional District Judge had been complied with. According to Mr. Chatterji, an expression of regret having been made earlier than the passing of the resolutions on 19th January, 1954, by the Anandapur Bar Association and the Bench Clerk having already been transferred from Anandapur, the resolutions could not be in the same terms as were suggested by the Additional District Judge; but the two resolutions passed on 19th January, 1954, coupled with the expression of individual regret made on 8th January, 1954, complied in substance with the essential terms of the draft resolution which the Additional District Judge had made over on 23rd December, 1953. Mr. Chatterji has contended that this view of the matter has not been properly considered by the High Court. He has submitted that in view of the order passed by the learned Munsif himself on 8th January, 1954, the proceeding against the appellant should be treated as having been dropped and concluded on that date.

Mr. Chatterji has also drawn our attention to ground No. VI in the petition for special leave dated 9th May, 1955, in which the appellant said that he was

> "willing and prepared to submit before this Court expressions of unreserved regret and apology for his error of judgment and indiscretion, if any, in the discharge of his professional duties."

We cannot accept the contention of Mr. Chatterji that the order passed by the learned Munsif on 8th January, 1954, had the effect of terminating and bringing to an end the proceeding against the appellant. The learned Judges of the High Court rightly pointed out that the report of the Munsif dated 12th December, 1953, was a report which was submitted to the High Court. Under the provisions of section 14 of the Legal Practitioners Act, such a report had to be forwarded to the High Court by the District Judge, accompanied by his opinion. It was not open to the Additional District Judge to send back the record to the Munsif. The efforts of the Additional District Judge were, indeed, well-intentioned; but at that stage, after the Munsif had made his report to the High Court, the High Court alone was competent to pass final orders in the matter.

Apart, however, from that difficulty, we are not satisfied that the terms of settlement suggested by the Additional District Judge were fully complied with in this case. It is true that the appellant did express his regret and to that extent the settlement suggested by the Additional Distric Judge was carried out. It is also true that by the resolutions passed on 19th January, 1954, the earlier resolution of 8th October, 1953, was cancelled, but one essential and important part of the terms of settlement suggested by the Additional District Judge was that the Association should express regret at what had happened. Resolution No. 1, dated 19th January, 1954, was so worded as to give the impression that the misunderstanding between the Munsif and the appellant was all due to the Bench Clerk and that misunderstanding having been removed, Resolution No. 6, dated 8th October, 1953, should be withdrawn. There is nothing in the resolution to show that the appellant was in any way at fault, a fault which he had expiated by an expression of regret. It may be pointed out that the earlier resolution, Resolution No. 6, dated 8th October, 1953, had been communicated to a large number of persons and authorities and the later resolution dated 19th January, 1954, passed in the diluted form in which it was passed, could hardly undo the damage which had been made by the earlier resolution.

On merits we agree with the High Court that the appellant was undoubtedly guilty of grave professional misconduct. A member of the Bar undoubtedly owes a duty to his client and must place before the Court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. At the same time, a member of the Bar is an officer of the Court and owes a duty to the Court in which he is appearing. He must uphold the dignity and decorum of the Court and must not do anything to bring the Court itself into disrepute. The appellant before us grossly overstepped the limits of propriety when he made imputations of partiality and unfairness against the Munsif in open Court. In suggesting that the Munsif followed no principle in his orders, the appellant was adding insult to injury; because the Munsif had merely upheld an order of his predecessor on the preliminary point of jurisdiction and court-fees, which order had been upheld by the High Court in revision. Scandalising the Court in such manner is really polluting the very fount of justice; such conduct as the appellant indulged in was not a matter between an individual member of the Bar and a member of the judicial service; it brought into disrepute the whole administration of justice. From that point of view, the conduct of the appellant was highly reprehensible. The appellant gave no evidence in support of his version of the incidents, though he had an opportunity of doing so, if he so desired.

The only point left for consideration is the question of punishment. On a matter of this nature, this Court would be reluctant to interfere with the order of the High Court as respects the disciplinary action to be taken against a member of the Bar who has been guilty of professional misconduct. There are, however, two mitigating circumstances. One is that the learned Munsif himself recommended suspension of practice for one year only. The appellant was suspended from practice with effect from 15th March, 1955. The order of suspension has now lasted for a little more than a year and eight months. The second mitigating circumstance is that the appellant did file a written apology and expressed regret to the learned Munsif on 8th January, 1954. It is unfortunate that the appellant did not take up a more contrite attitude in the High Court. In this Court, the appellant tried to make out that the proceeding against him should not have been revived; he however showed his willingness to offer an apology and expression of regret. Having regard to all the circumstances, we think that the punishment imposed errs on the side of excess. We would accordingly reduce the period of suspension to two years only.

In the result, the petition under Article 32 is dismissed and the appeal is also dismissed, subject to the reduction of the period of suspension as indicated above. In the circumstances of this case, there will be no order for costs.

Petition and appeal dismissed and
period of suspension reduced.

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[END OF VOL. (1957) 1 M.L.J. (S.C.).[